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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 187

EARL R. DEEN,
Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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July 11, 1958.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Earl R. Deen, of Brown County, Texas, petitioner herein, a second time prays that a writ of certiorari be issued. The first time he prayed that a writ of certiorari be issued to review the final judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, reversing the judgment of a trial court based on findings of fact made by a jury in a Federal Employers Liability Act case in favor of him, an injured railway employee, and

rendering judgment that Deen recover nothing against his employer, Gulf, Colorado and Santa Fe Railway Company. That writ was granted and this Honorable Court reversed and remanded the case to the Court of Civil Appeals for further proceedings in conformity to the Mandate of this Honorable Court. *(353 U. S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 718.)*

This time petitioner, Deen, prays that a writ of certiorari be issued to review the final judgment of The Supreme Court of Texas, finally adjudicating all issues left open upon remand by the mandate of the Supreme Court of the United States, but such judgment affirming the action of the Court of Civil Appeals in reducing the amount of recovery allowed Deen in the trial court based on findings made by the jury.

I. STATEMENT OF THE MATTER INVOLVED

Upon remand of this cause by the Supreme Court of the United States, the Court of Civil Appeals of Texas correctly held the mandate of this Honorable Court saying: "We hold the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury" precluded it from further inquiring into the sufficiency of the evidence to support the jury's conclusion of employer negligence. (Opinion of Court of Civil Appeals, p. 3, l. 17). The Court thereupon reviewed all other assignments of error, left open by the mandate of this Court, and found that none of these presented reversible error with the exception that the Court of Civil Ap-

peals found the verdict of the jury on damages excessive and ordered a remittitur of $5500.00 on threat of remanding the cause for a new trial. (Opinion of Court of Civil Appeals, p. 4, l. 22.) Deen filed the remittitur, reserving the right to complain thereof, as depriving him of the right of trial by jury given him by the FELA, in subsequent appeals and thereupon the Court of Civil Appeals reduced the jury's finding of damages in the sum of $39,000.00 by the $5500.00, and rendered judgment in favor of Deen in the sum of $33,500.00. (Certified copy of judgment is contained in the record.)

Both sides applied to The Supreme Court of Texas for writs of error. In his application Deen complained of the Court of Civil Appeals' tampering with the jury verdict and the judgment of the trial court on damages; the railway company, among other points, complaining of the Court of Civil Appeals' holding that the mandate of the Supreme Court of the United States precluded it from inquiring into the sufficiency of the evidence to support the jury's conclusion of employer negligence. (Copies of both Applications are in the record.) The Supreme Court of Texas granted both writs of error. (Certified copy of order granting writs enclosed.) On final hearing The Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals on all points, approved the remittitur of $5500.00 required by the Court of Civil Appeals, applying such remittitur to the trial court's judgment in favor of Deen in the principal sum of $21,450.00 rather than to the jury verdict in the sum of $39,000.00, as the Court of

Civil Appeals did, obviously considering it was a clerical error for the Court of Civil Appeals, after remittitur, to render judgment in favor of Deen for $12,050.00 more than was allowed him by the jury and the trial court, after Deen's damages had been reduced by his own negligence; however, The Supreme Court of Texas reversed the judgment of the Court of Civil Appeals, on the point that the mandate of the Supreme Court of the United States precluded it from inquiring into the sufficiency of the evidence to support the jury's conclusion of employer negligence and The Supreme Court of Texas directed the Court of Civil Appeals to inquire into this question independent of the mandate of the Supreme Court of the United States.

> "Thus the, and the only, error which the Court of Civil Appeals has committed to the prejudice of the defendant is to hold, as it did, that the action of the Supreme Court of the United States has foreclosed the exercise of the independent judgment of the former upon the factual question of weight and preponderance of the evidence, depriving the appellate court of its power to reverse and remand for a new trial on that ground,". (Opinion, The Supreme Court of Texas, p. 54.)

The Court failed, though twice requested, to issue execution on the cost judgment awarded Deen by the Supreme Court of the United States.

While Deen's motion for rehearing was still pending in The Supreme Court of Texas, in which he complained the above rulings were in violation of the mandate of the Supreme Court of the United States and in which he com-

plained that the Court's ruling on the excessiveness of the damages, as found by the jury and the trial court, deprived him of his right of trial by jury under the FELA, (Motion for Rehearing is in the Record) and before the mandate of The Supreme Court of Texas was even issued to the Court of Civil Appeals, the Court of Civil Appeals of Texas, without any notice to the parties, set aside its second opinion rendered after remand from this Honorable Court, and rendered a new opinion reversing and remanding this cause to the trial court for a new trial on the ground the evidence was insufficient to support the jury's conclusion of employer negligence. (Certified copy of new opinion and order of the Court is included in the record.) This was on May 16, 1958. Four days later on May 20, 1958, the Court of Civil Appeals on its own motion set aside the foregoing opinion and order. (Order of May 20, 1958 in the Record.) Eight days later on May 28, 1958 Deen's motion for Rehearing was overruled by The Supreme Court of Texas and its judgment became final. (Certified copy of order is in record.)

The mandate of The Supreme Court of Texas was thereafter stayed on Motion by Deen and petition for a second writ of certiorari duly filed.

II. JURISDICTION

1. Jurisdiction to grant this Petition is sustained by *Title 28 U. S. C. A., Section 1651, subsection (a)* (June 25, 1948, c. 646, 62 stat. 944, Amended May 24, 1949, c. 139, sec. 90, 63 stat. 102.)

*Reference to the opinion of the Supreme Court of Texas are to the pages of the opinion in the Appendix.

2. Jurisdiction to grant this Petition is also sustained by *Title 28 U. S. C. A. section 1257, sub. section (3) (June 25, 1948, c. 646, 62 stat. 629.)*

3. The statutes of the United States applied by The Supreme Court of Texas are *45 U. S. C. A., sections 51-59 (35 stat. 65, as amended 36 stat. 291 and 53 stat. 1404.)*

All questions left open by the mandate of the Supreme Court of the United States have now been finally adjudicated in the Supreme Court of Texas. (Deen's filed Motion for Rehearing as shown by the Record; the Order overruling his Motion for Rehearing in The Supreme Court of Texas on May 28, 1958 is enclosed in the Record.) The opinion of The Supreme Court of Texas, when construed with the mandate of the Supreme Court of the United States, required The Supreme Court of Texas to perform the ministerial duty of reforming and affirming the judgment of the Trial Court and rendering judgment in favor of Deen for $15,950.00 with interest, and costs, which Deen asked it to do. (Deen's Motion for Rehearing contained in the Record.) Since the Court of Civil Appeals and The Supreme Court of Texas held any error of the trial court caused by the excessiveness of the jury's verdict could be cured by the remittitur, which Deen filed, and since the railway company has at no time complained that the remittitur was not adequate to cure any alleged error in this respect, The Supreme Court of Texas owed a ministerial duty under the mandate of the Supreme Court of the United States to render judgment at least, for the $15,950.00, with interest and costs, leaving to Deen the right to question the

authority of the Texas appellate courts to require the remittitur by petition for certiorari. If all questions have been finally adjudicated, the judgment of the highest state court is final under the provisions of 28 U. S. C. A. sec. 1257, sub. sec. (3) regardless of the form in which it is written by the state court.

Department of Banking v. Pink,
317 U. S. 264, 63 S. Ct. 233;

Market Street R. Co. v. R. R. Commission of Calif.,
324 U. S. 548, 65 S. Ct. 770;

Richfield Oil Corp. v. State Board of Equalization,
329 U. S. 69, 67 S. Ct. 156;

Cole v. Violette,
319 U. S. 581, 63 S. Ct. 1204;

Pope v. Atlantic Coast Line R. Co.,
345 U. S. 379, 73 S. Ct. 749.

Under the provisions of *28 U. S. C. A. section 1651, sub. sec. (a)* supra, the Supreme Court of the United States has power to do all that is necessary to give effect to its own judgment.

Baltimore & O. R. Co. v. United States,
279 U. S. 781, 49 S. Ct. 492.

"When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus. In re Potts, 166 U. S. 263, 265, 17 S. Ct. 520, 41 L. Ed. 994; In re Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 S. Ct. 291, 40 L. Ed.

414, and cases cited. It is well understood that this court has power to do all that is necessary to give effect to its judgments."

It is inconceivable that this Honorable Court does not have jurisdiction to review a judgment of a state supreme court, which, in violation of the mandate of this Honorable Court, reverses and remands a cause for further proceedings to an inferior state court. Contemporaneously herewith, and in the alternative, Deen has filed a Motion for Leave to File a Petition for Writ of Mandamus to be issued to the Chief Justice and the Associate Justices of The Supreme Court of Texas.

III. QUESTIONS PRESENTED

1. The first question presented is whether The Supreme Court of Texas has misconstrued the mandate of the Supreme Court of the United States, which directed the Court of Civil Appeals of Texas: "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury", by interpreting that mandate to permit the Court of Civil Appeals of Texas to inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence.

2. The second question presented is whether The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in failing to issue execution for costs, though twice requested, incurred by Deen in the Supreme Court of the United States and awarded to him by judgment of that court.

3. The third question presented is whether the Court of Civil Appeals of Texas, with the approval of The Supreme Court of Texas, has deprived Deen of the right of trial by jury given him by the Congress under the Federal Employers Liability Act by finding the verdict of the jury on damages and the judgment of the trial court rendered in conformity thereto excessive and in requiring Deen to file a remittitur of $5500.00.

IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A proper construction of the mandate of the Supreme Court of the United States precludes the Court of Civil Appeals of Texas from inquiring into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing Deen's injuries. The Court of Civil Appeals of Texas correctly so construed the mandate. The Supreme Court of Texas reversed on this point alone, the judgment of the Court of Civil Appeals which had reformed and affirmed the judgment of the trial court in favor of Deen. (Opinion of The Supreme Court of Texas, page 54, par. 2.) In its mandate, now recalled, The Supreme Court of Texas directed the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion of employer evidence, irrespective of the mandate of the Supreme Court of the United States. (Opinion, p. 55 l. 3.) The Supreme Court of Texas has misconstrued the mandate of the Supreme

Court of the United States, has disobeyed the same and has directed the Court of Civil Appeals of Texas to disobey that mandate.

The reluctance of The Supreme Court of Texas to enforce the mandate of the Supreme Court of the United States is further illustrated by its neglect to issue execution against the railway company on the judgment for costs awarded Deen in the Supreme Court of the United States, though Deen twice requested such execution. (Deen's Application for Writ of Error, p. 15, line 7, Deen's Reply to Gulf, Colorado & Santa Fe Ry. Co's Application for Writ of Error, p. 1, line 4; Demand for Execution filed with the Clerk of The Supreme Court of Texas March 15, 1958.)

The proofs justified with reason the jury's findings that $39,000.00 would reasonably compensate Deen for his injuries sustained in his master's employment and that his recovery should be reduced $17,550.00 (45%) because of his own negligence (R. 156).* The trial court rendered judgment for $21,450.00, interests and costs in conformity to the jury's verdict (R. 157). There is no evidence that the jury's verdict was induced by passion or prejudice nor that the trial court abused his discretion in refusing to find the verdict of the jury excessive. The Court of Civil Appeals, with the approval of The Supreme Court of Texas, found the verdict excessive by $5500.00, and required Deen to file a remittitur for that amount. (Opinion of The Supreme Court of Texas, p. 55, par. 2.) Thus, the Court

of Civil Appeals, with the approval of The Supreme Court of Texas, has deprived Deen a second time of his right of trial by jury, the first time, on negligence and causation; this time, on damages.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. *The Construction of the Mandate of the Supreme Court of the United States.*

The proper construction of the mandate of the Supreme Court of the United States is the paramount issue on this second application for writ of certiorari. The Supreme Court of the United States in the mandate to the Court of Civil Appeals of Texas says:

> "We hold the proofs justify with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury."

The mandate refers to *Rogers v. Missouri Pacific R. Co., 352 U. S. 512, 77 S. Ct. 443*, where the Court fully expresses its views. In that case the Court says:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

What is clearer than that the Supreme Court of the United States is telling the Court of Civil Appeals in its mandate that Deen's evidence has met the test for recovery under FELA as established by the Supreme Court of the

*R. refers to former Record before this Honorable Court

United States, not only in the Deen case, but also in numerous other cases:

Rogers v. Missouri Pacific R. Co.,
352 U. S. 512, 77 S. Ct. 443, 1 L. Ed. 2d 493;

Webb v. Illinois Central R. Co.,
352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503;

Ferguson v. Moore-McCormack Lines, Inc.,
352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511;

Shaw v. Atlantic Coast Line R. Co.,
353 U. S. 920, 77 S. Ct. 680, 1 L. Ed. 2d 718;

Futrelle v. Atlantic Coast Line R. Co.,
353 U. S. 920, 77 S. Ct. 682, 1 L. Ed. 2d 718;

Thomson v. Texas & P. R. Co.,
353 U. S. 926, 77 S. Ct. 698, 1 L. Ed. 2d 722;

Ringhiser v. Chesapeake & O. R. Co.,
354 U. S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268;

McBride v. Toledo Terminal R. Co.,
354 U. S. 517, 77 S. Ct. 1398, 1 L. Ed. 2d 1534;

Gibson v. Thompson,
355 U. S. 18, 78 S. Ct. 2, 2 L. Ed. 2d 1;

Stinson v. Atlantic Coast Line R. Co.,
355 U. S. 62, 78 S. Ct. 136, 2 L. Ed. 93;

Honeycut v. Wabash Ry. Co.,
355 U. S. 424, 78 S. Ct. 393, 2 L. Ed. 2d 380;

Ferguson v. St. Louis-San Francisco R. Co.,
78 S. Ct. 671;

Butler v. Whiteman,
78 S. Ct. 734;

Kernan v. American Dredging Co.,
355 U. S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382;

Sinkler v. Missouri Pacific R. R. Co.,
78 S. Ct. 758.

The Court of Civil Appeals of Texas correctly construed the mandate as precluding it from inquiring into the sufficiency of the evidence to support the jury's conclusion of employer negligence. (Opinion of Court of Civil Appeals, p. 3, line 17). The Supreme Court of Texas placed a different construction on the mandate and held that it did not preclude the Court of Civil Appeals from inquiring into the sufficiency of the evidence to support the jury's conclusion of employer negligence and reversed the Court of Civil Appeals on this point alone. (Opinion of The Supreme Court of Texas, p. 55, par. 2.)

The Supreme Court of Texas came to the remarkable conclusion that the Supreme Court of the United States in saying: "We hold the proofs justify with reason the jury's conclusion that the employer negligence played a part in producing petitioner's injury," did not even consider the sufficiency of the evidence to support the jury's verdict establishing employer negligence. Under The Supreme Court of Texas' construction of the judgment and mandate

of the Supreme Court of the United States, all that the Supreme Court of the United States decided was that the Texas appellate courts must not use the words: "There is no evidence to support the jury's verdict" in taking the verdict away from Deen, but the Texas appellate courts may use the words, "The evidence is insufficient to support the jury's verdict" in taking the verdict away from Deen. If that is done, Deen's right of trial by jury has been vindicated, according to The Supreme Court of Texas, and the Supreme Court of the United States will not concern itself with the matter. The Supreme Court of Texas makes it easy for the Texas appellate courts to make this adjustment by telling them, in effect, that ordinarily where they make the finding of no evidence they can easily make the finding of insufficient evidence because the greater includes the less. Under The Supreme Court of Texas' interpretation of the opinion and mandate of this Honorable Court, the Deen case has to be submitted to the jury by the trial court because this Honorable Court has said the Court of Civil Appeals was in error in holding there was "no evidence" to support the jury's conclusion of employer negligence. However, under The Supreme Court of Texas' interpretation, if the jury again finds in favor of Deen, the verdict has to be set aside on the insufficiency of the evidence under the decision of The Supreme Court of Texas that the Court of Civil Appeals having found there is no evidence to support the verdict in favor of Deen must be presumed to have also found the evidence is insufficent to support such jury verdict. Thus, the case must be retried

until some jury ultimately finds in favor of the railway company. The Supreme Court of Texas assures us the trial court can only grant two new trials on the insufficiency of the evidence to support the jury, but if Deen is lucky enough to get two more jury verdicts in his favor, there is no reason why the Court of Civil Appeals cannot take a few more cracks at the verdict and The Supreme Court of Texas could horn in a few more times on the law of the case theory, i. e. that it had declared the finding of "no evidence" by the Court of Civil Appeals included the lesser finding of insufficient evidence to support the verdict in favor of Deen. Thus The Supreme Court of Texas' conception of a jury trial given Deen by the Congress under FELA is one that only permits findings in favor of the railway company to stand.

The Supreme Court of Texas has not only misconstrued the clear mandate of the Supreme Court of the United States, as shown by the mandate's own words, and when considered in the light of numerous other decisions of this Honorable Court, but also, to reach such a warped construction, The Supreme Court of Texas has made many false presumptions:

1. The Supreme Court of Texas says Deen only presented the question of whether the Court of Civil Appeals was correct in holding that there was "no evidence" to support the jury's conclusion of employer negligence in his petition for writ of certiorari and therefore the Supreme Court of the United States did

not pass on the sufficiency of the evidence to support the jury's verdict. The petition for writ of certiorari speaks for itself. A fair construction thereof is that Deen contended the Court of Civil Appeals was in error in holding there was "no evidence" in supporting the jury's conclusion of employer negligence because the evidence amply supported that conclusion. Both parties considered the sufficiency of the evidence to support the jury's verdict was before the Supreme Court of the United States and argued this point at great length in written briefs filed in the Court and in oral argument. (Deen's Brief on the Merits, pp. 7-10, 10-12, 14-19, Deen's Reply Brief, pp. 2, 9-20, 22-28, the heading of the discussion on page 22 being italicized in big type, "C. Whether Evidence is Sufficient to Support Finding on Railroad's Failure to Furnish Proper Tools," Gulf, Colorado & Santa Fe Ry. Co's. Brief in the Supreme Court of the United States, pp. 66-74.)

2. The second false presumption of The Supreme Court of Texas is that by denying Deen's prayer for judgment, affirming the judgment of the trial court, the Supreme Court of the United States had indicated it had left the assignment concerning the weight and preponderance of the evidence open for examination of the Texas appellate courts on remand of the case. No such conclusion can be drawn. Questions relating to the sufficiency of Deen's pleading, the correctness of the court's charge and the excessiveness of the ver-

dict had been presented to the Court of Civil Appeals by the railway company in the original appeal but not passed on by that Court. (Opinion Court of Civil Appeals, p. 3, first sentence, par. 2.) These questions were not even presented nor considered in the Supreme Court of the United States. These questions required a remand of the case to the state court for further proceedings irrespective of the Court's ruling on the sufficiency of the evidence to support the jury's verdict. Hence, the remand of the case by itself is no indication whatever of the intention of this Honorable Court with respect to the disposition of the assignment relating to the sufficiency of the evidence.

3. The third false presumption of The Supreme Court of Texas is there is doubt if the Supreme Court of the United States would pass upon the question of great weight and preponderance of the evidence since under Texas law this presents a question of fact. (Opinion of The Supreme Court of Texas, p. 52, par. 2.) *Harsh v. Illinois Terminal R. R. Co., 348 U. S. 940, 99 L. Ed. 736, 75 S. Ct. 362, reversing Terminal R. R. Co. v. Harsh, 351 Ill. App. 272, 114 N. E. 2d 901* is the answer to this. The intermediate appellate court of Illinois reversed and remanded the above case for a new trial on the point that the verdict of the jury was against the weight and preponderance of the evidence. The Supreme Court of the United States granted a writ of certiorari and reversed the Court of Appeals in

a per curiam memorandum opinion simply citing *Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 961.*

4. *Harsh v. Illinois Terminal R. R. Co.*, supra, is also the answer to The Supreme Court of Texas' statement that the Supreme Court of the United States has not yet taken the step to review a decision of the state court which merely reverses and remands a case for a new trial on the ground that the verdict is against the great weight and preponderance of the evidence and that the authorities indicate this step will not be taken. (Opinion of The Supreme Court of Texas, p. 52, par. 2.) The authorities which The Supreme Court of Texas rely on as indicating that the Supreme Court of the United States will not review a decision of a state court that reverses and remands a case for a new trial are those cited by the railway company in its Application for Writ of Error to The Supreme Court of Texas holding generally that where a state court reverses and remands a case for a new trial the Supreme Court of the United States does not have jurisdiction because the judgment is not final. (Railway's Application for Writ of Error, p. 3.) But there is no authority that says that a judgment of a state court finally adjudicating all points left open by the mandate of the Supreme Court of the United States is not final because the state court has reversed and remanded the case for further proceedings in violation of the mandate of the Supreme Court of the United

States. If that is the law, then mandates of the Supreme Court of the United States to state courts are enforceable only if the state courts are willing to enforce them.

5. Underlying the whole opinion of The Supreme Court of Texas is the final false assumption that the Federal Employers Liability Act and the decisions of this Court interpreting that Act are enforceable in Texas state courts only to the extent that Texas practice permits such enforcement. This, of course, explains the long explanation by The Supreme Court of Texas of the hazy distinction between the "no evidence rule" and the "insufficient evidence rule" as it exists in Texas practice and the conclusion of The Supreme Court of Texas that "no evidence" is a question of law and "insufficient evidence" is a question of fact and since under Texas practice The Supreme Court of Texas may only review "no evidence" questions, a fortiori, the Supreme Court of the United States is in the same situation. But if the enforcement of Deen's rights depends upon local practice, and the wresting from him of the jury verdict by the Court of Civil Appeals, with the approval by The Supreme Court of Texas, was in accord with local practice, which Deen denies, but which petitioner is certain The Supreme Court of Texas will concede, then Deen's writ of certiorari should not have been granted in the first place. And that is the very contention the railway company made in resisting the petition for certiorari in its

Reply thereto, (For example, see Reply, p. 6, line 19); and after the granting of the writ the railway company still contended the writ had been improvidently granted because the case had been correctly decided in accordance with local practice. (For example, see Respondent's Reply Brief in the Supreme Court of the United States, p. 2, the last paragraph.) In fact, Question (4) presented by the respondent, the railway company, to the Supreme Court of the United States as shown on page 4 of its Reply Brief was:

"(4) The construction by the Texas court of Texas pleadings, Texas jury findings, in the light of the record, is binding upon the United States Supreme Court."

In granting the writ of certiorari and in remanding the cause, by necesary implication, the Supreme Court of the United States decided this question twice against the contentions of the railway company, and now The Supreme Court of Texas advances it a third time. What is more remarkable is *Hopson v. Gulf Oil Corp., 150 Tex. 1, 237 S. W. 2d 352*, principally relied on by The Supreme Court of Texas to support its theory of local practice controlling the enforcement of rights under FELA (Opinion of Supreme Court of Texas, p. 49-50), was principally relied on by the railway company in making the same contention twice before the Supreme Court of the United States on the previous review of this case. (Respondent's Reply Brief, p. 52.)

The Supreme Court of the United States has many times said substantive rights given federal employers by the Congress under FELA are not to be defeated by local practice and that the act is to be uniformly applied throughout the country.

Ellis v. Union Pac. Ry. Co. (1947),
329 U. S. 649, 67 S. Ct. 598, 600:

"Whether those standards are satisfied is a federal question, the rights created being federal rights."

Garrett v. Moore-McCormack (1942),
317 U. S. 239, 63 S. Ct. 246:

"This court has specifically held that the Jones Act is to have uniform application throughout the country unaffected by 'local views of common law rules * * *.' This uniformity extends to the type of proof necessary for judgment."

The Supreme Court of the United States has applied this rule to "sufficiency of the evidence" questions, which so troubled The Supreme Court of Texas:

Brady v. Southern R. Co. (1943),
320 U. S. 476, 64 S. Ct. 232:

"But where a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question."

Chicago M. & St. P. Ry. Co. v. Coogan (1926),
271 U. S. 472, 46 S. Ct. 564, 565:

"The employer is liable for injury or death resulting in whole or in part from the negligence specified

in the act and proof of such negligence is essential to recover. The kind or amount of evidence required to establish it is not subject to the control of the several states.".

Port Terminal Railroad Association v. Ross (1956), (Supreme Court of Texas), 289 S. W. 2d 220, 226.

The Supreme Court of Texas discussed Deen' Original Application for Writ of Error in the above case and told why it was going to refuse it. (This was prior to the granting of the Petition for Writ of Certiorari by this Honorable Court.) In discussing the Deen case, The Supreme Court of Texas itself stated the above rule in these words:

"In an action under the Federal Employer's Liability Act, the question of what constitutes negligence, and the sufficiency of the evidence to raise that question for the jury, is to be determined by the applicable federal decisions."

The Supreme Court of the United States is the final authority to interpret the effect of a jury verdict rendered in a Texas state court in a FELA case. [*Arnold v. Panhandle and Santa Fe Railway Co. (1957), 353 U. S. 360, 77 S. Ct. 840.*]

Whether a record under state practice would entitle a party to a new trial is immaterial in FELA cases.

Minneapolis St. P. & S. S. M. Ry Co. v. Moquin (1915), 283 U. S. 520, 51 S. Ct. 501.

In the above case the Supreme Court of the United States held a remittitur required by the trial court and affirmed by the Supreme Court of Minnesota did not cure an error. In the course of its opinion the Court said:

> "Nor need we inquire into the rules applicable to trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial."

The mandate of the Supreme Court of the United States is clear. The Supreme Court of Texas has misconstrued and violated it, whether the usual and ordinary meaning of the words of the mandate alone are considered or whether those words are considered in the light of the decisions of this Honorable Court.

Petitioner does not believe respondent will deny that a state court is obligated to obey the mandate of this Court, and that the judgment of the Supreme Court of the United States establishes the law of the case, and even if it is erroneous, which Deen does not concede, it may not be disturbed by the state court or even by the Supreme Court of the United States itself.

In re Sanford Fork & Tool Co. (1895), 160 U. S. 247, 16 S. Ct. 291, 293:

"When a case has once been decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. Sibald v. U. S., 12 Pet. 488, 492; Railway Co. v. Anderson, 149 U. S. 237, 13 Sup. Ct. 843. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. Perkins v. Fourniquet, 14 How. 313, 330; In re Washington & G. R. Co., 140 U. S. 91, 11 Sup. Ct. 673; Bank v. Hunter, 152 U. S. 512, 14 Sup. Ct. 675; In re City Nat. Bank of Ft. Worth, 153 U. S. 246, 14 Sup. Ct. 804. But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. Hinckley v. Morton, 103 U. S. 764; Mason v. Mining Co., 153 U. S. 361, 14 Sup. Ct. 847; Nashua & L. R. Corp. v. Boston & L.R. Corp. 5 U. S. App. 97, 2 C. C. A. 542, and 51 Fed. 929."

B. *Execution for Costs.*

As heretofore pointed out, The Texas Supreme Court has failed to issue execution for costs in the sum of $1294.32 adjudged to Deen by the Supreme Court of the United

States, April 8, 1957 though Deen twice requested such execution.

C. *Whether the Verdict of the Jury is Excessive.*

While the mandate of the Supreme Court of the United States did not leave open for further examination by the State courts the sufficiency of the evidence to support the jury's conclusion of employer negligence, it did leave open certain other questions all of which have now been decided. Both The Supreme Court of Texas and the Court of Civil Appeals held that the railway company's assignments of error relating to the insufficiency of Deen's pleadings and the incorrectness of the trial court's charge and all other asignments of error did not present reversible error. The railway company did not complain of these rulings by motion for rehearing in The Supreme Court of Texas and they have now become final. The Court of Civil Appeals, with the Approval of The Supreme Court of Texas, found the verdict of the jury and the judgment of the trial court rendered thereon to be excessive in the amount of $5500.00. (Opinion, Court of Civil Appeals, p. 4, next to last sentence) Deen filed a remittitur for this amount in the Court of Civil Appeals on threat of having the cause reversed and remanded for a new trial, but reserved the right to question the authority of the Court of Civil Appeals to require the remittitur. (Deen's Motion for Rehearing and Deen's Remittitur appear in the accompanying Record.) The Supreme Court of Texas construed this remittitur in the sum of $5500.00 as being applicable to the trial court's judgment in the principal sum of $21,450.00 (Opinion of

Supreme Court of Texas, p. 39, l. 1). Under this ruling of The Supreme Court of Texas, Deen was entitled, after remittitur, to a judgment of $15,950.00, with interest and costs, if, as Deen contends, the sufficiency of the evidence to support the jury's conclusion of employer negligence had already been decided in his favor by the Supreme Court of the United States. After the remittitur, the railway company did not contend either in the Court of Civil Appeals of Texas or in The Supreme Court of Texas that the evidence was not sufficient to support the verdict on damages, as diminished by the Court, and the judgment rendered thereon, although the railway company still complained that the evidence was insufficient to support the jury's conclusion that the employer negligence played a part in producing Deen's injuries.

Deen says that the Court of Civil Appeals of Texas and The Supreme Court of Texas have deprived him of the right of trial by jury given him by the Congress under the FELA by taking away from him $5500.00 of the damages awarded him by the jury. Deen says the Court of Civil Appeals has tampered twice with the jury verdict; the first time with the jury's findings on negligence and causation. This time, with the jury's findings of damages. The jury found from a preponderance of the evidence that $39,000.00 would reasonably compensate Deen for his injury but that this recovery should be reduced by $17,550.00 because of Deen's contributory negligence (R. 156). These findings were amply supported by the evidence. Deen was 36 years old at the time he sustained his injuries (R. 10). He earned

$280.00 to $300.00 a month after deductions (R. 27). Deen's right leg sustained a compound fracture midway between the knee and the ankle (R. 30, 31). He was in a state of shock and had a lot of pain (R. 30). The undisputed medical evidence showed Deen sustained twenty per cent permanent partial disability (R. 40). Other evidence showed Deen would experience pain in the future, had a permanent lack of sensation in his heel, had a bent knee for weight bearing, could climb ladders only with great difficulty, could no longer dance and that he was crippled and had to walk with a limp. Deen was away from work because of his injuries about ten months, July 12, 1949 to April 3, 1950 (R. 47). Deen's actual loss of earnings amounted to $2350.00 (R. 47). Deen's loss of earning capacity is permanent. The jury and the trial court say the above evidence, and other evidence in the record not here detailed, including the jury's and trial court's observation of Deen's leg, establish that $39,000.00 will reasonably compensate Deen for his injuries, but that his recovery should be reduced $17,550.00 because of his own negligence.

In awarding damages to Deen, the jury and the trial court were entitled to consider the depreciated value of the dollar (15 Amer. Jur. sec. 314, p. 620). When Deen's recovery is compared with recoveries in other cases for similar injuries there is nothing to indicate passion or prejudice on the part of the jury.

15 Amer. Jur., sec. 219, p. 641.

"Verdicts up to $50,000.00 for the fracture of both legs may be sustained when taken into considera-

> tion with various other pertinent factors in the case, including other injuries received by the plaintiff as a result of the defendant's wrongful act. Similarly, verdicts up to $35,000 for the fracture of one leg, up to $27,000 for the fracture of one or both hips, up to $28,000 for the fracture of a knee, up to $35,000 for the fracture of both ankles, and up to $20,000 for the fracture of one ankle, have been declared not to be so excessive as to justify any interference by the court."

The railway company is hardly in a position to contend that the jury in the Deen case was actuated by passion and prejudice. The jury made many finding in favor of the railway company. In fact, the railway company contended in the Supreme Court of the United States that the jury in the Deen case rendered a verdict in its favor (Respondent's Reply Brief, p. 75, where this contention is stated by the railway company in italics for emphasis.)

The Court of Civil Appeals said:

> "The finding of contributory negligence, which reduced Deen's recovery, did not relieve Appellant of the injurious consequence of the excessive verdict for $39,000.00 and the resulting excess judgment based thereon." (Opinion of the Court of Civil Appeals, p. 4, l. 18.)

The Court required a remittitur of $5500.00, and upon this being filed, deducted this amount from the $39,000.00 and rendered judgment for $33,500.00. (Copy of Judgment of the Court of Civil Appeals is in the Record.) The railway company has never complained that the remittitur of $5500.00 was not adequate nor that the evidence did not support the damages found by the jury and the trial court,

after such damages had been reduced by the Court of Civil Appeals and such reduction approved by The Supreme Court of Texas. On what basis do the Texas appellate courts say the evidence supports with reason the jury's findings that $33,500.00 will reasonably compensate Deen for his injuries but $39,000.00 is too much? The duration of human life, the permanent loss of partial earning capacity, the humilation of limping through life, restriction of movement, pain and suffering, and the value of the dollar in 1983, are not subject to exact mathematical calculations. Yet the Texas appellate courts say they are right when they conclude that the evidence on these, and other uncertain factors, establish that $33,500.00 will reasonably compensate Deen for his injuries, but that the trial court and the jury, who actually saw Deen, are wrong when they conclude that the evidence, on these, and other uncertain factors, establish that $39,000.00 will reasonably compensate Deen for his injuries. If the Texas appellate courts are just guessing, why do they guess in favor of the railway company instead of in favor of the injured employee?

The Congress provided in FELA that the jury would determine the damages: "* * * but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; * * *" *(45 USCA sec. 53, Apr. 1908, c. 149, sec. 3, 35 stat. 66)*. Damages are inseparably connected with the cause of action. What will it profit federal employees if the right of trial by jury is protected on negligence and causation, but not on damages?

Whether damages awarded by a jury and a trial court are excessive are determined by general principles of law as administered in Federal Courts and not by the local law. *C. & O. Ry. Co. v. Kelly (1915), 241 U. S. 485, 36 S. Ct. 630; Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin (1915), 283 U. S. 520, 51 S. Ct. 501.* In the latter case the Supreme Court of the United States held a remittitur required by the trial court, and affirmed by the Supreme Court of Minnesota, did not cure an error. In the course of its opinion the Court said:

> "Nor need we inquire into the rules applicable to trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial."

The rule in the federal courts is that excessiveness of the verdict is a matter resting within the discretion of the trial court and appellate courts only interfere when there is an abuse of discretion. *Fairmount Glass Works v. Cub Fork Coal Co. (1932), 287 U. S. 474, 33 S. Ct. 252; City of Lincoln v. Power (1894), 151 U. S. 443, 14 S. Ct. 386.*

In

Neese v. Southern Railway Company (1955), 350 U. S. 77, 76 S. Ct. 131

the Supreme Court of the United States had before it an FELA case, where the trial court found a verdict exces-

sive and ordered a remittitur. The Court of Appeals, *216 F. 2d 772*, found the damages were still excessive in spite of the remittitur and reversed the cause solely for further proceedings on damages. On certiorari, the Supreme Court of the United States reversed the Court of Appeals, saying on the damages question:

> "For apart from that question, as we view the evidence, we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

The Court of Appeals of Illinois in discussing the alleged excessiveness of a jury verdict in a FELA case said in

Pennell v. B & O R R Co.,

13 Ill. App. 2d 433, 142 N. E. 2d 497

> "To consider this issue would necessarily require reviewing the weight of the evidence since it is obvious there is an evidentiary basis for a substantial verdict. The recent case of Neese v. Southern Railway Company, 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. 60, lends support to this view. In that case, the Court of Appeals determined in a carefully considered and actuarially supported opinion that the verdict was excessive. The Supreme Court in a per curiam opinion, simply concluded that the record supported the jury's verdict and reversed the Court of Appeals. While there was no clarifying discussion of the scope of review of the issue of excessiveness of the verdict in intermediate appellate courts, the result reached indicates the view of the Supreme Court on that issue. In addition, our examination of the cases reaching the U. S. Supreme Court touching on the issue of exces-

siveness of the verdict reveals no objective criteria against which an intermediate appellate court might weigh the exercise of discretion by the trial court in handling such issue. Nor has the Congress defined the outer limits of recovery in such cases. Therefore, in the light of the Harsh case, and in the absence of any approved standards or criteria by which a verdict may be adjudged either reasonable or excessive or so large as to indicate prejudice of the jury, this court cannot determine the trial court's treatment of this issue to be erroneous."

In the Deen case, after Deen filed his remittitur of $5,500.00, the Court of Civil Appeals applied this amount to the damages in the sum of $39,000.00, as found by the jury, and reduced that amount to $33,500.00 and rendered judgment in favor of Deen for $33,500.00. The Court, as previously stated, apparently overlooked the fact that the jury and the trial court had already reduced these damages $17,550.00 because of Deen's own negligence. The result was the Court of Civil Appeals rendered judgment in favor of Deen for the principal sum of $33,500.00, which was $12,050.00 more than was awarded him by the jury and the trial court. (Judgment of Court of Civil Appeals.) The Supreme Court of Texas obviously considered the Court of Civil Appeals made a clerical error in rendering judgment for that amount and that the Court intended to apply the $5500.00 remittitur to the principal amount of Deen's judgment in the sum of $21,450.00, leaving the recovery at $15,950.00. (Opinion of The Supreme Court of Texas,

p. 39.) In any event, petitioner says the verdict of the jury was amply supported by the evidence and the trial court did not abuse his discretion in rendering judgment for the damages, as found by the jury, and the Court of Civil Appeals and The Supreme Court of Texas should not have disturbed the jury's verdict and the judgment of the trial court rendered in conformity thereto.

VI. CONCLUSION

Contemporaneously herewith petitioner in filing a Motion for Leave to File Petition for Writ of Mandamus. Petitioner seeks this remedy in the alternative, in the event the Court decides that it does not have jurisdiction to entertain the petition for writ of certiorari. All matters in dispute have now been finally decided either by the Supreme Court of the United States or by The Supreme Court of Texas. It was the ministerial duty of The Supreme Court of Texas, based on its own opinion and the mandate of this Honorable Court, to render judgment in favor of Deen for $15,950.00, with interest and costs. Deen requested the Court to render such judgment without prejudice to his right to complain of the remittitur in this Court. If that had been done, then there is no question but what the judgment would have been final, and would have formed a basis for Deen's petition for writ of certiorari on the sole point whether The Texas appellate courts had a second time deprived him of the right of trial by jury given him by the

Congress by taking away a substantial part of the damages awarded to him by the jury and the trial court, although the verdict of the jury and the judgment of the trial court were well supported by the evidence. Petitioner does not believe that a judgment of a state court that finally disposes of all issues between the parties loses its finality because the state Supreme Court in violation of the mandate of the Supreme Court of the United States remands the case to a lower court for further proceedings. If such a judgment is not final, and this court does not have jurisdiction of Deen's second petition for certiorari, then petitioner asks this Court to compel The Supreme Court of Texas by writ of mandamus to perform its ministerial duty and render final judgment herein so that petitioner on certiorari may have this Court review the damages in question.

It is respectfully submitted that the opinion and judgment of The Supreme Court of Texas violates the mandate of the Supreme Court of the United States in so far as The Supreme Court of Texas directs the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury and that the opinion of The Supreme Court of Texas approving the action of the Court of Civil Appeals in requiring a remittitur on the basis that the verdict of the jury and the judgment of the trial court are excessive is in conflict with express provisions of the Federal Employers Liability Act and con-

trolling decisions of this Court construing that Act; petitioner asks that a writ of certiorari be granted in order for this Court to review the record and the opinion of The Supreme Court of Texas and that if that cannot be done, in the alternative, petitioner asks the Court to give him leave to file a Petition for Writ of Mandamus against the Justices of The Supreme Court of Texas, and if The Supreme Court of Texas is compelled to render judgment in the Deen case, in accordance with its opinion and the mandate of this Court, that then this Court grant this Petition for Certiorari to review the decision of The Supreme Court of Texas on the question of remittitur; that this Court forthwith issue execution for costs in the sum of $1294.32, with interest thereon at the rate of 6% per annum from April 8, 1957, to the United States marshal for the Southern District of Texas at Houston, Texas, against Gulf, Colorado & Santa Fe Railway Company, which costs were awarded petitioner by the Supreme Court of the United States in a judgment rendered April 8, 1957, which the Court of Civil Appeals and The Supreme Court of Texas, though each twice requested, have failed to enforce by execution, as the mandate of this Court directs, and that on final hearing, petitioner asks this Court to reverse the judgment of The Supreme Court of Texas, reversing and remanding this cause for further proceedings in violation of the mandate of this Court and that this Court render judgment in favor of Deen for $21,450.00, with interest at the rate of 6% per annum from April 26, 1954, and all

costs of suit, and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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/s/ ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE,
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July 11, 1958.

I certify that a copy of the foregoing Petition for Writ of Certiorari for the Petitioner has been mailed on the 11th day of July, 1958, to the Respondent's attorneys as follows: To Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

/s/ ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE

APPENDIX

In the

SUPREME COURT OF TEXAS

No. A-6584

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Petitioner,

v.

EARL R. DEEN,
Respondent.

From Brown County, Eleventh District

The judgment here under review is one by the Court of Civil Appeals (306 S. W. 2d 171) affirming, upon condition of remittitur of $5500, a $21,450 judgment of the trial court in favor of the plaintiff Deen in his action for personal injuries against the defendant Gulf, Colorado and Santa Fe Railway Company under the Federal Employers' Liability Act, the affirmance being consequent upon reversal by the Supreme Court of the United States of the prior judgment of the Court of Civil Appeals in the same case, in which the latter court had held the verdict to be without support in the evidence.[1]

[1] Deen v. Gulf, Colorado and Santa Fe Railway Co., 353 U. S. 925, reversing Gulf, Colorado and Santa Fe Railway Co. v. Deen, 275 S. W. 2d 529, Tex. Civ. App.

The principal questions are narrow ones involving the impact of the Supreme Court judgment of reversal upon the factual jurisdiction of our courts of Civil Appeals. The factual powers in question are: (a) that of reversing and remanding for a new trial, when the court believes the verdict or the fact findings of the trial judge to be so against the great weight and preponderance of the evidence as to be manifestly wrong, notwithsta ding they may be supported by some evidence of substantial character[2]; (b) that of requiring, as a condition of affirmance and alternative to reversal and remand for a new trial, a remittitur of such portion of the damages as the court considers excessive.[3]

Both the plaintiff employee and defendant employer being now petitioners in this court, they will be sometimes referred to herein by their respective trial court designations.

Deen's recovery in the trial court was by reason of a broken leg suffered in the course of his regular employment in the shops of the defendant as the result of an effort on the part of himself and an assisting fellow servant to dump a 550-pound piece of babbitt metal from an old melting pot preparatory to putting it into a new pot. The old pot, which was more or less the same size and shape of

[2]See "The Question of Insufficient Evidence on Appeal," 30 Tex. L. Rev. 803; King v. King, 150 Tex. 662, 244 S. W. 2d 660; Hopson v. Gulf Oil Corp., 150 Tex. 1, 237 S. W. 2d 352; also Ex Parte Texas, 315 U. S. 8, 13; Barker v. Coastal Builders, 153 Tex. 540, 271 S. W. 2d 798; Bowman v. Puckett, 144 Tex. 125, 188 S. W. 2d 571.

[3]Rule 440, Tex. R. Civ. Proc.; Texas Pipe Line Co. v. Hunt, 149 Tex. 33, 39-40, 228 S. W. 2d 151, 155; Carter v. Texarkana Bus Co., Tex. , 295 S. W. 2d 653.

an ordinary kitchen sink and itself weighed some 250 pounds, was sitting on the floor, and the two employees sought to dump the metal content by lifting with their own hands the far edge of the pot more or less in their own direction, with the result that, when the metal fell out, it struck the plaintiff's leg.

There was a proper lifting crane or apparatus at hand which the plaintiff knew how to operate by himself, but which had, according to his evidence, no proper clamps or other implements whereby to affix the lifting chains to the edge of the pot for effective handling of this particular operation. The plaintiff, while a mere servant, was the one responsible for the particular work, understood it well, and had actually done it several times before by hand with the aid of three or four fellow servants, although the lifting in the latter instances was evidently done by raising the side of the pot nearest the lifters and thus dumping the contents away from them. In the present instance, the plaintiff, although not directed, or in any fashion required, to do the dumping operation himself, was attempting to do so, when his fellow servant voluntarily proceeded to help him. While it does not appear that additional assistants had been actually delegated by the foreman, or were standing nearby awaiting a chance to help, the evidence showed clearly that the plaintiff could have got all the needed assistance by asking for it, as, indeed, he had done in prior instances without difficulty.

Notwithstanding the foregoing, the plaintiff's suit was based expressly, perhaps necessarily, upon the combined propositions that he was not supplied with proper tools and that sufficient assistance was not properly afforded him to do the lifting by hand, as well as upon the further proposition that the defendant failed to give him proper supervision.

The jury found (a) that the accident proximately resulted from negligence of the defendant in failing to supply proper tools and that the plaintiff's total damages were $39,000; but it also found (b) that the defendant did *not* fail to give the plaintiff proper supervision, and (c) that the plaintiff himself was negligent in failing to obtain additional help and thus contribute to his own injury to the extent of 45 per cent. The trial court rendered judgment accordingly for the plaintiff in the net sum of $21,450.

The defendant thereupon appealed to the Court of Civil Appeals, presenting there, in due form and based on a proper record in the trial court, three alleged errors (along with others hereinafter discussed) to wit, (1) that the abovementioned sole finding of negligence on the part of the defendant was unsupported by evidence, and that accordingly the appellate court should reverse and render judgment that the plaintiff take nothing, as the trial court should have done; (2) that (alternatively) the same finding was so against the great weight and preponderance of the evidence as to be manifestly unjust, and that

the appellate court should accordingly reverse and grant a new trial, as the trial court should have done; and (3) that the gross damages found ($39,000) were excessive. As before indicated, the Court of Civil Appeals, by its opinion reported in 275 S. W. 2d 529, sustained assignment (1) rendered judgment accordingly that the plaintiff take nothing, but did not in that opinion expressly rule or comment upon point (2) or the other remaining points.

The points in question, as indicated by the citations in footnotes 2 and 3, supra, respectively correspond to definitely separate, familiar and long-established institutions of Texas practice. Our practice recognizes important differences between (1) and (2). The former we have always considered as presenting a question of law and the latter one of fact. The problem in the former is merely to ascertain if there is any evidence of more than a *scintilla* to support the verdict. In the latter it is the quite different problem of balancing substantial evidence that supports the verdict against substantial evidence that is against the verdict and thus determining, for the sole purpose of ordering or not ordering a new trial, whether the great weight and preponderance of the evidence is against the verdict.

While the instant case concerns only the powers of our appellate courts, the two points, with their differences, also occur in the trial court. For example, the trial judge may refuse to submit a requested jury issue when he considers that the answer sought would be without support in the evidence and may accordingly instruct a verdict

and render judgment for the opposite party, or, having let the issue go to the jury, may later render judgment *non obstante veredicto* on the same ground. On the other hand, the judge can do none of these things where the issue or verdict has some support in the evidence, although the great weight and preponderance of the evidence may be the other way. In the latter situation he may grant a new trial, but, by reason of our constitutional guarantee of trial by jury, this is all he may do, and, under Rule 326 of our Rules of Civil Procedure, he may do it not more than twice in the same litigation.

On appeal, our Courts of Civil Appeals exercise the same powers as the trial judge in the matter of upholding or setting aside a verdict or verdicts by reason of evidence or deficiency therein. If the appellant raises only the law point of "No evidence", they affirm the judgment for the appellee when they consider the verdict to be supported by more than a *scintilla*, and, when they consider it not so supported they ordinarily reverse and render final judgment in the appellant's favor. If the appellant raises only the point that the verdict is against the great weight and preponderance of the evidence, the court, of course, affirms the trial court judgment when it considers the point to be without merit; but, when the point is considered well taken, the court merely remands for a new trial, and cannot make its own findings or render final judgment for the appellant in accordance with the greater weight and preponderance of the evidence. The action of the appellate court in such a situation is thus no more nor less than that of

the trial court when the latter grants or refuses a new trial on the same point. The particular appellate power derives directly from Art. V. Sec. 6, of the State Constitution. See the citations in footnote 2.

Often both points are raised on appeal. In that event the Court of Civil Appeals will ordinarily act first upon the point of "no evidence". If it considers the latter well taken, it will reverse and, ordinarily, render final judgment for the appellant, disregarding the point of weight and preponderance. But if it regards the point of "no evidence" as not well taken, that is, if it finds the verdict to be supported by more than a *scintilla* of evidence, it must then consider the point of weight and preponderance, affirming the trial court, if the point is not well taken and, if the contrary, reversing and remanding for a new trial.

The two questions also have different status in our Supreme Court. Being a court of law only, we will not review a holding of the Court of Civil Appeals that a verdict is or is not against the great weight and preponderance of the evidence, the holding being considered one of fact. We will, however, review a holding that the verdict is or is not supported by evidence, that matter being one of law. What we actually do with the case depends on the circumstances. For example, if we disagree with the holding of the Court of Civil Appeals that a verdict for the plaintiff is unsupported by evidence, we naturally reverse its judgment in so far as the latter decreed that the plaintiff take nothing; but if the defendant, as appellant

in that court, has also raised the factual question of weight and preponderance, and the court has not expressly passed upon it (having held that there was "no evidence") we must take a further step, since we ourselves cannot decide that question. In this situation we ordinarily assume that the court, having held "no evidence", would also hold the verdict to be against the great weight and preponderance of the evidence, and so we ourselves remand the case for a new trial, although if, for some special reason there were a doubt as to the view of the Court of Civil Appeals, we would remand to the latter court so that it might expressly pass on the weight and preponderance question, and accordingly order a new trial or affirm the trial court judgment, as the case might be.[4]

Sometimes the Court of Civil Appeals, having both points before it, overrules, for example, that of the defendant asserting the verdict to be without support in the evidence but fails to pass on the defendant's affirmative assignment that the verdict is so against the great weight and preponderance of the evidence as to require a new trial. In that situation we consider the failure of the appellate court to rule on the weight and preponderance point to be an error of law requiring us upon proper application to assume jurisdiction and to remand the case to the appellate court with direction to rule, and this although we may agree with its view that the verdict is supported by more than a *scintilla* of evidence. See King v. King, footnote 2, supra.

[4]Hopson v. Gu[illegible] Oil Corp.; Barker v. Coastal Builders; Bowman v. Puckett, footnote 2, supra.

In the instant case, as before stated, the Court of Civil Appeals in its first action (275 SW 2d 529) held the finding of negligence of the defendant in failing to furnish proper tools to be unsupported by evidence, reversing the trial court and rendering final judgment for the defendant, without commenting on the assignment concerning weight and preponderance, which latter could have conduced to no more than a new trial. We in turn upheld that judgment by denying writ of error, and the case, going on to the Supreme Court of the United States, was there reversed and remanded to the Court of Civil Appeals. 353 U.S. 925. If we had disagreed with the Court of Civil Appeals in its conclusion of "no evidence", instead of agreeing with it, as we did, we would yet not have affirmed the trial court, but would either have remanded the case to the latter for a new trial (on the above-stated theory that the Court of Civil Appeals had in effect held the finding of negligence to be against the great weight and preponderance of the evidence — a holding beyond our power of review) or would have remanded to the appellate court for an express ruling on the weight and preponderance question (with consequent grant of a new trial or affirmance of the trial court, as the case might be).

When the case returned from the Supreme Court of the United States to the Court of Civil Appeals, the defendant moved the latter court to remand forthwith for a new trial on the theory that the court had in its original opinion (275 SW 2d 529) in effect held the verdict to be against the great weight and preponderance of the evidence, when

it held it to be unsupported by evidence. Alternatively the defendant moved that the court consider and expressly sustain the assignment concerning weight and preponderance and, alternatively, certain other assignments, including one asserting the damages to be excessive. The court (306 SW 2d 171) denied the motion in all respects except as to the damages, which it found excessive in the sum of $5500. It thus in effect affirmed the judgment of the trial court upon condition of a remittitur. Ordinarily it would have either remanded for a new trial on the primary ground stated in the motion, or in any event have proceeded to give its own opinion as to whether the verdict was against the great weight and preponderance of the evidence. But it believed the decision of the Supreme Court of the United States to have foreclosed that question in favor of the plaintiff. Both parties now complain of this judgment of the Court of Civil Appeals. The defendant complains of its failure to remand the case for a new trial (as having by its earlier opinion in effect determined the verdict to be against the great weight and preponderance of the evidence) or to expressly rule upon the latter question and accordingly remand for a new trial. Alternatively, the defendant complains of the court's failure to remand on account of certain alleged errors concerning the pleadings and the charge, hereinafter discussed. The plaintiff, for his part, complains of the required remittitur.

Dealing first with the defendant's contentions concerning the matters of weight and preponderance of the evidence, they do not, of course, ask us to review what we

cannot review, because the Court of Civil Appeals has not exercised its own factual judgment upon the evidence, but has merely held, as a matter of law, that the effect of the reversal by the Supreme Court of the United States was to prevent it from exercising its own judgment on the point, or, perhaps, that the Supreme Court has itself determined that the verdict was *not* against the great weight and preponderance of the evidence. 306 SW 2d 171, 174. We think the Court of Civil Appeals erred in so holding.

The opinion of the Supreme Court[5] and the relevant portions of its mandate of reversal to the Court of Civil Appeals[6] are copied in the footnotes.

In Hopson v. Gulf Oil Corp., cited in footnotes 2 and 4, supra, we had before us almost the same question presented here, although the act under which the suit was brought was the Jones Act instead of the Federal Employers' Lia-

[5] "PER CURIAM: We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers v. Missouri Pac. R. Co., 352 U. S. 500; Webb v. Illinois Cent. R. Co., 352 U. S. 512;* Ferguson v. Moore-McCormack Lines, 352 U. S. 521. The judgment of the Court of Civil Appeals is reversed and the case remanded. Mr. Justice Frankfurter would dismiss the writ as improvidently granted. See his dissent in *Rogers v. Mo. Pac. R. Co., 352 U. S. 500, 524.* Mr. Justice Harlan and Mr. Justice Whittaker dissent for the reasons given in Mr. Justice Harlan's opinion in *Rogers v. Mo. Pac., 352 U. S. 500, 559.* Mr. Justice Burton dissents" (353 U. S. 925).

[6] "It is ordered and * * * adjudged * * * by this court that the judgment * * * of the said Court of Civil Appeals * * * in this cause be, and the same is hereby, *reversed with costs.*

"IT IS FURTHER ORDERED and adjudged by this Court as follows: We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. Rogers v. Missouri Pacific R. Co., 352 U. S. 500; Webb v. Illinois Central R. Co., 352 U. S. 512; Ferguson v. Moore-McCormack Lines, 352 U. S. 521.

"IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the Court of Civil Appeals of the State of Texas, Eleventh Supreme Judicial District."

bility Act, and the issue was not incident to a judgment of the federal Supreme Court in the same litigation.

In that case, as in the instant one, a trial court judgment for the plaintiff had been reversed by the Court of Civil Appeals and judgment rendered for the defendant on the ground that the finding of negligence of the latter was unsupported by evidence, the court omitting to rule upon the defendant's alternative point that the verdict was against the great weight and preponderance of the evidence. On writ of error to this court, the plaintiff contended that (a) the verdict had support in the evidence and (b) if we should so hold, we should affirm the judgment of the trial court rather than remand the case for a new trial as we would ordinarily do, since the policy of the Supreme Court of the United States in Jones Act and Federal Employers' Liability Act cases was much more liberal than that of the Texas courts in the matter of evidence necessary to uphold verdicts of negligence.

We sustained contention (1) but overruled contention (2) and remanded the case for a new trial on the theory that the plaintiff, by invoking the jurisdiction of the Texas courts, become bound by our established practice in the matter in question.[7]

---

[7]"Under our established practice, judgment will not be rendered on the jury's verdict, but the cause will be remanded to the district court for another trial. The trial court, on respondent's motion, rendered judgment that petitioner take nothing by his suit, for damages, notwithstanding the jury's findings that respondent's negligence in failing to furnished assistance proximately paused petitioner's injury. On the appeal by petitioner respondent presented in its brief filed in the Court of Civil Appeals several cross-asignments of error, one of them being that the evidence is insufficient to support the jury's answer to issue

(Continued on next page.)

To have held otherwise than we did would have in effect destroyed in cases of this kind the established Texas practice of granting new trials, when the Court of Civil Appeals finds the verdict to be against the great weight and preponderance of the evidence. Congress may, indeed, prescribe rules of substantive law within the federal field and

(Continued)
No. 8, the issue as to proximate cause. This practice is authorized by Rule No. 324 of the Texas Rules of Civil Procedure. The Court of Civil Appeals, in affirming the judgment of the district court, found that there is no evidence to support the jury's answer to issue No. 8. That finding of no evidence includes the lesser finding that the evidence is insufficient to support the answer to issue No. 8, and since the question of insufficiency was presented in the Court of Civil Appeals by respondent's cross-assignment, the cause must be remanded to the district court for a new trial. Liberty Film Lines, Inc. v. Porter, 136 Tex. 49, 53-54, 146 S. W. 2d 982; Bowman v. Puckett, 144 Tex. 125, 133-134, 188 S. W. 2d 571; Najera v. Great Atlantic & Pacific Tea Co., 146 Tex. 367, 371, 20 S. W. 2d 365.

"Relying on recent decisions of the Supreme Court of the United States, which manifest a tendency to sustain on very little evidence verdicts of juries in suits brought under the Jones Act and under the Federal Employers' Liability Act, petitioner in effect takes the position that the established practice in this state should be disregarded and that judgment should be rendered here on the jury's verdict. Among other authorities petitioner cites Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, and Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. But neither of those decisions nor any other that we have found is authority for departure, in a suit under the Jones Act or under the Federal Employers' Liability Act, from our settled rules of procedure. By the institution of his suit petitioner invoked the jurisdiction of the state courts and the suit should be tried as any other suit for damages for negligence is tried in the state courts, provided there is compliance with the specific requirements of the Federal Statutes, that is to say, that assumed risk and negligence of fellow servants are not to be defenses and contributory negligence not a complete defense, and that the injured seaman or employee is entitled to trial by jury.

"Review of the jury's verdict by the Court of Civil Appeals under its jurisdiction over the facts, with reversal for want of sufficient evidence, does not amount to denial of the right of trial by jury. The Court of Civil Appeals does not and cannot substitute fact findings of its own for the findings of the jury, but in exercising its jurisdiction over the facts the Court of Civil Appeals may reverse the trial court's judgment and remand the case for another trial, when it finds that the verdict is so contrary to the great weight and preponderance of the evidence as to be clearly wrong. The power thus exercised is the same as that exercised by the trial court when it sets aside the jury's verdict on account of insufficient evidence and awards a new trial. And this practice is not a denial of the right of trial by jury. Choate v. San Antonio & A. P. Ry. Co., 91 Tex. 406, 409-410, 44 S. W. 69." (150 Tex. 1, 10-11, 237 S. W. 2d 352, 358.)

permit persons to seek relief there-under in Texas Courts, if Texas opens its courts to such actions, as it does; but obviously Congress would not presume to alter the practice of our courts, so long as it does not transgress constitutional limitations of due process, nor does Texas, by lending its courts for the more convenient operation of federal laws, surrender her right to have her courts follow their own system of practice. Surely it could not be held, for example, that in cases like the present, Congress could require the Texas courts to make use of only general verdicts instead of our usual practice of special verdicts or require that in a jury case a party might always appeal in our courts without regard to our requirement that he must first file a motion for a new trial.

Admittedly the Supreme Court of the United States does take jurisdiction to review the decisions of state courts under the Federal Employers' Liability Act which hold the verdict to be unsupported by evidence and render final judgment accordingly. Conceivably it will go further and review such decisions as merely reverse and remand for a new trial on the factual ground that the verdict, although supported by evidence of more than a scintilla, is yet against the overwhelming weight and preponderance of the evidence. But the latter step has not yet been taken, so far as we are advised, and the authorities cited to us indicate that it will not be.

If it was taken in the instant case, it was not clearly so. In the first place, the point made by the plaintiff in his

petition for *certiorari* was that, and only that, the Court of Civil Appeals, by its action in setting aside the verdict for "no evidence" and accordingly rendering judgment that he take nothing, had deprived him of his right to trial by jury specified in the act. True, he did pray the Supreme Court to affirm the trial court judgment in his favor, but this prayer was in effect denied him when the case was merely remanded to the Court of Civil Appeals, in which the defendant's other assignments of error remained without having been expressly adjudicated, including the assignment concerning the weight and preponderance of the evidence. Orders of the Supreme Court such as here involved are not usually construed as foreclosing further action in the state court except such as may be necessarily inconsistent with the order. Schneider Granite Co. v. Gast Realty & I. Co. U. S. 288. In cases like the present, moreover, the court, where it intends to adjudicate issues undisposed by the court *a quo*, ordinarily so states in unmistakable fashion. See the specific language concerning other assignments in Rogers v. Mo. Pac. R. Co., 352 U. S. 500, and in Webb v. Illinois Central R. Co., 352 U. S. 512.

Moreover, the question of great weight and preponderance of the evidence being, at least under our law, one of fact, there is doubt if the Supreme Court would pass upon it in any event. See Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 393-4.

As to the other attacks of the defendant upon the judgment under review, to wit, its upholding of the action of the trial court in (a) overruling the defendant's special exceptions to the plaintiff's pleading concerning "proper tools", (b) overruling the defendant's objections to the submission of Special Issues Nos. 1, 2 and 3 and related issues concerning the failure of the defendant to furnish "proper tools" and (c) rejecting the defendant's tendered Special Issue No. 5 concerning contributory negligence of the plaintiff "in placing his foot where the babbitt could and did strike same", we agree with the Court of Civil Appeals that none of these assignments presents reversible error.

Thus the, and the only, error which the Court of Civil Appeals has committed to the prejudice of the defendant is to hold, as it did, that the action of the Supreme Court of the United States has foreclosed the exercise of the independent judgment of the former upon the factual question of weight and preponderance of the evidence, depriving the appellate court of its power to reverse and remand for a new trial on that ground. This error requires that the decision below be reversed.

Consistently with our decisions cited in footnote 4, supra, we might ourselves now remand the case to the trial court for a new trial, but considering the peculiar circumstances of this case, and in the hope of making somewhat clearer

the basic issue decided, we shall remand the case to the Court of Civil Appeals with directions to the latter to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant in failing to furnish proper tools is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and, upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial.

What we have said disposes *a fortiori* of the complaint on the part of the plaintiff concerning that portion of the judgment below requiring the remittitur of $5500. It may be added that the function of the appellate court in this behalf is but another item of its factual jurisdiction and corresponds to the well recognized power of the trial judge to require a remittitur as alternative to granting a new trial. As evidenced by the citations in footnote 3, supra, this power, whether exercised by the Court of Civil Appeals or by the trial judge, is essentially but a part of the power to order a new trial and thus does not usurp the jury function of assessing damages. We find nothing in the Federal Employers' Liability Act or in the decisions of the Supreme Court of the United States purporting to negative the power of the state courts thus to require a remittitur, when the plaintiff invokes their jurisdiction, and certainly nothing in the decision of the Supreme Court in the instant case purporting to inhibit the action, which the Court of Civil Appeals has since taken in this respect.

The judgment of the Court of Civil Appeals is reversed and the cause is remanded to that court for further proceedings in accordance with this opinion.

W. ST. JOHN GARWOOD
Associate Justice

WSJG/p

Opinion delivered:
May 7, 1958

APPENDIX

In the

SUPREME COURT OF TEXAS

May 7, 1958

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

v.

EARL R. DEEN

From Brown County, Eleventh District

This cause came on to be heard on writs of error to the Court of Civil Appeals for the Eleventh Supreme Judical District, and the original transcript and the transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, it is *adjudged, ordered* and *decreed* that judgment be, and hereby is, reversed and set aside and that this cause be, and hereby is, remanded to the said Court of Civil Appeals for further proceedings in accordance with the opinion herein this day delivered.

It is further ordered that respondent-petitioner, Earl R. Deen, pay the costs in this behalf expended and incurred in this Court; that petitioner-respondent, Gulf, Colorado & Santa Fe Railway Comp[illegible]ny, have and recover of and from

the said Earl R. Deen the costs by it expended and incurred in this Court, and that this decision, with a copy of the opinion, be certified to the Court of Civil Appeals for the Eleventh Supreme Judicial District for observance.

(Opinion of the Court by Associate Justice Garwood.)

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of the Supreme Court of Texas in the case of the Gulf, Colorado & Santa Fe Railway Company v. Earl R. Deen, No. A-6584, from Brown County, Eleventh District, as such judgment appears of record in the minutes of said Court under date of May 7, 1958.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 13th day of June, 1958.

GEO. H. TEMPLIN, *Clerk*,
By CARL B. LYDA, *Deputy*.

(SEAL)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1958

No. 187

EARL R. DEEN, *Petitioner*

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 187

EARL R. DEEN, *Petitioner*

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that the petition for certiorari be dismissed, or in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

The decision of the Supreme Court of Texas to which the petition for certiorari is directed, is correctly copied in the appendix to the petition for certiorari and appears in 312 S.W. 2d 933.

We cannot accept as being in all respects accurate

the petitioner's "Statement of the Matter Involved." Actually, of course, the actual happenings are a matter of record and neither our description of the mandate of the United States Supreme Court nor of the opinions of the Court of Civil Appeals and the Texas Supreme Court nor the descriptions thereof by petitioner can change what actually happened nor what is in those opinions. We respectfully refer to the opinions and proceedings in the respective courts for a full and accurate statement. Here we merely make a very brief summary.

On a jury verdict which found some issues in favor of the plaintiff and some issues in favor of the defendant, the District Court of Brown County, Texas, rendered judgment in favor of Earl R. Deen for $21,450.00. The Court of Civil Appeals at Eastland (275 S.W. 2d 529) found *no evidence* to support the jury's finding of negligence on the part of the railroad in failing to furnish proper tools and reversed and rendered. Deen applied to the Supreme Court of Texas for writ of error, which was denied. Deen then applied to the United States Supreme Court for certiorari, which was granted, and the Supreme Court of the United States (353 U.S. 925, 77 S.Ct. 715, 1 L.Ed. 721) reversed and remanded same to the Court of Civil Appeals in a per curiam opinion. Thereafter, the Court of Civil Appeals (306 S.W. 2d 171) held that it was precluded by the mandate of the Supreme Court of the United States, from exercising the jurisdiction given to it, to reverse and remand because of jury findings which were against the overwhelming weight and preponderance of the evidence, but did

require a remittitur of $5,500.00 and, when Deen filed that remittitur, affirmed the trial court judgment. The Santa Fe and Deen each applied for writ of error to the Texas Supreme Court, both writs were granted, and the Supreme Court of Texas (312 S.W. 2d 933) reversed and remanded the case to the Court of Civil Appeals with instructions to pass upon the question of whether the jury's finding was against the overwhelming weight and preponderance of the evidence. On motion by Deen, the Supreme Court of Texas recalled its mandate to the Court of Civil Appeals so that Deen might apply to this Court for certiorari.

Deen's petition for certiorari is directed at a judgment of the Supreme Court of Texas which remands the cause to the Court of Civil Appeals at Eastland for the determination by that court of the issue of whether or not the case should be reversed and remanded for a new trial because the jury's verdict was against the overwhelming weight and preponderance of the evidence. Furthermore, the Court of Civil Appeals can either reverse and remand for an entirely new trial of all issues on the merits or it can hold that the verdict was not against the overwhelming weight and preponderance of the evidence, in which case, of course, it would affirm the trial court's judgment subject to the remittitur. To summarize, this is a case remanded by the State Supreme Court to an intermediate appellate court, in which no judgment or decision has yet been made, and if the decision were made adverse to Deen it would be a remand for an entirely new trial on the merits. In such a situation

there is no conceivable way to construe this as other than a certiorari to a judgment which is not final.

Deen, in his petition for certiorari (p. 8), refers to the fact that the Supreme Court of Texas did not issue execution for costs in Deen's favor covering the costs in the United States Supreme Court taxed against the defendant, Santa Fe. The Supreme Court of the United States adjudged costs in the amount of $1,294.32 against Santa Fe. Deen is absolutely unjustified in saying that the Santa Fe ever questioned this liability for these costs in any court at any time. Item 13 in the record is "Reply to Demand for Execution" which shows the contrary positively and unequivocally. He is likewise in error in stating that the Supreme Court of Texas twice refused his application. He was advised by the clerk (March 17, 1958) that under *Texas Rules of Civil Procedure* 149, 436, 447 502 and 511, execution for costs would issue when the appeal was finally disposed of.

Of course, when the appeal is finally disposed of Deen will get his execution for costs and the Santa Fe will get its execution for costs, or the parties will get together to offset the cost bills and the Santa Fe will pay whatever difference there may be. It should be noted that Deen is very careful not to assert that the Supreme Court of Texas had any character of statutory or other authority to issue the execution he prayed for at the time he prayed for it. We think that this is sufficient reply to the petition for certiorari insofar as it applies to the question of getting out execution for costs.

JURISDICTION

The next question is jurisdiction. Jurisdiction is denied. There is no issue but that this action was brought under the Federal Employer's Liability Act by a railway employee engaged in interstate commerce against an employer engaged in interstate commerce. That fact does not make final a judgment which remands the case for further proceedings in the Court of Civil Appeals or, if Deen be correct, which remands it to the trial court for a trial on the merits. That is the exact holding of the Supreme Court of the United States in *Southern Pacific Co. vs. Charles M. Gileo*, 351 U.S. 493, 100 L.Ed. 1357, 76 S.Ct. 952, which dismissed writs in the Eufrazia and Eelk cases.

The judgment appealed from is not final and there is no basis for certiorari under 28 *U.S.C.A.*, Section 1257. Authorities on this point are presented below.

28 *U.S.C.A.* 1651 does not authorize certiorari to a State court. Insofar as it authorizes mandamus, this is covered by a separate petition for mandamus by Deen and a separate answer thereto by the Santa Fe.

QUESTIONS PRESENTED

1. Can the Supreme Court of the United States grant a writ of certiorari to the Texas Supreme Court on a judgment which merely remands the cause and is not final?

2. Did the mandate of this Court remanding this cause to the State court for further proceedings constitute an order by this Court to the Court of Civil

Appeals to affirm the judgment of the Trial Court?

3. Is the ordering of a new trial because a verdict is against the overwhelming weight and preponderance of the evidence a denial of a jury trial whether same be ordered by a trial or an appellate court?

4. Is there any provision of the United States Constitution or any statute enacted by Congress which exempts FELA suits filed in the State Courts from State rules of practice applicable to all other litigants?

STATEMENT AND AUTHORITIES ON JURISDICTION

That the Supreme Court's jurisdiction to grant certiorari to a State court is limited to final judgment is, of course, beyond question. 28 *U.S.C.A.*, Section 1257 expressly so provides and this Court has so stated at least a hundred times. Of those cases the following are only a respectable sample.

Southern Pacific Co. vs. Gileo, 351 U.S. 493, 100 L.Ed. 1357, 76 S.Ct. 952;

Gospel Army vs. Los Angeles, 331 U.S. 543, 91 L.Ed. 1662, 1665, 67 S.Ct. 1428;

Republic Natural Gas Co. vs. Oklahoma, 334 U.S. 62, 92 L.Ed. 1212, 68 S.Ct. 972;

Market Street R. Co. vs. Railroad Commission, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171;

Georgia R & P Co. vs. Decatur, 262 U.S. 432, 67 L.Ed. 1065, 43 S.Ct. 613;

Haseltine vs. Central National Bank, 183 U.S. 130, 46 L.Ed. 117, 22 S.Ct. 49;

Coe vs. Armour Fertilizer Works, 237 U.S. 413, 59 L.Ed. 1027, 35 S.Ct. 625;
Great Western Telegraph Co. vs. Burnham, 162 U.S. 339, 40 L.Ed. 991, 16 S.Ct. 850;
Louisiana Navigation Co. vs. Oyster Commission, 226 U.S. 99, 57 L.Ed. 138, 33 S.Ct. 78;
Bostwick vs. Brinkerhoff, 106 U.S. 3, 27 L.Ed. 73, 1 S.Ct. 15;
Zeller vs. Switzer, 91 U.S. 487, 23 L.Ed. 366;
U.S. vs. Krall, 19 S.Ct. 712, 174 U.S. 385, 43 L.Ed. 1017;
Johnson vs. Keith, 6 S.Ct. 669, 117 U.S. 199, 29 L.Ed. 888;
McComb vs. County Commissioners of Knox County, 91 U.S. 1, 23 L.Ed. 185;
Kimball vs. Evans, 93 U.S. 320, 23 L.Ed. 920;
M.K.I. Ry. Co. vs. Olathe, 32 S.Ct. 46, 222 U.S. 185, 56 L.Ed. 155;
Winn vs. Jackson, 12 U.S. (Wheat) 135, 6 L.Ed. 577;
St. Clair County vs. Lovingston, 85 U.S. 628, 21 L.Ed. 813;
C.M. & St. P. R. Co. vs. Bolch, 242 U.S. 616, 61 L.Ed. 529, 37 S.Ct. 211.

And a judgment which remands the case to a lower appellate court for further proceedings is just as lacking in finality as one that remands the cause to the trial court.

California National Bank vs. Stateler, 171 U.S. 447, 43 L.Ed. 223, 19 S.Ct. 6;
Davis vs. Crouch, 94 U.S. 514, 24 L.Ed. 281;

Laclede Gas Light Co. vs. Public Service Commission, 304 U.S. 398, 82 L.Ed. 1422, 58 S.Ct. 988;

Drake vs. Kochersperger, 170 U.S. 303, 42 L.Ed. 1046, 18 S.Ct. 942;

McGourkey vs. Toledo & O.C.R. Co., 146 U.S. 536, 36 L.Ed. 1079, 13 S.Ct. 170;

Union Mutual Life Insurance vs. Kirchoff, 160 U.S. 374, 40 L.Ed. 461, 16 S.Ct. 318.

The authorities cited by Deen. (Petition for Certiorari, p. 7) are not contrary to those above cited and not a single one of such cases deal with a State court proceeding which was remanded to the trial court (or lower appellate court) for further proceedings or trial on the merits.

For example, one of the cases is *Market Street R. Co. vs. R. R. Commission of Calif.*, 324 U.S. 548, 89 L.Ed. 1171 (supra), where the proposition is stated as follows:

> "Our jurisdiction to review a state court judgment is confined by longstanding statute to one which is final. Judicial Code, Sec. 237, 28 USCA Sec. 344, 8 FCA title 28, Sec. 344. Final it must be in two senses; It must be subject to no further review or correction in any other state tribunal: it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Was the judgment from which Deen has taken certiorari final? That judgment was a *remand* of the

case to the Court of Civil Appeals to adjudicate "whether or not a jury finding of negligence of the defendant in failing to furnish proper tools is so against the weight and preponderance of the evidence as to require new trial in the interest of justice, and upon the basis of said adjudication, to either affirm the judgment of the trial court or grant a new trial." (Opinion of Texas Supreme Court, 312 S.W. 2d p. 942)

Deen, in his petition for certiorari, at no time makes any good faith attempt to show that the foregoing is anything close to a final judgment. His half-hearted attempt (petition of certiorari p. 5) directed to that end is his statement (which is correct) that the Court of Civil Appeals following the decision of the Supreme Court did prepare an opinion remanding the cause to the trial court for a new trial, but as he further points out, that order was set aside by the Court of Civil Appeals on May 20, 1958 (Petition for Certiorari, p. 5). As far as jurisdiction is concerned, it makes no difference which position Deen takes. If the Supreme Court's judgment is a judgment remanding the cause to the Court of Civil Appeals, it is not a final judgment. If the Court of Civil Appeals' withdrawn opinion be considered as not withdrawn, then the cause was remanded to the trial court for a new trial and that is not a final judgment.

In Deen's petition for certiorari there are some rather wild statements (see Petition, pp. 13 and 14, for example) which have no character of justification, wherein he tries to indicate that when a new trial is

granted (by the trial or appellate court) he will not get a trial de novo. The Supreme Court of Texas' opinion in this case, of course, shows the contrary and it should be noted that Deen cites no authority for his position.

A new trial in Texas is a trial de novo. Since he cites no authority, we will satisfy ourselves with the following quotation from *Wichita Falls Traction Co. vs. Cook* (Comm. App.), 60 S.W. 2d 764 (opinion adopted by the Supreme Court) and we quote from page 768:

> "The granting of a new trial means that the case shall be reinstated upon the docket of the trial court and stand for trial the same as though no trial had been had. If the court thinks that the ends of justice have not been attained by the verdict of the jury, it is clearly its duty to set aside the judgment rendered on the verdict. Texas & P. R. Co. v. Casey, 52 Tex. 112.
>
> "A trial by a jury is a lawful right given to litigants, and, when that right has been invoked, the procedure incident thereto must be followed. It is the peculiar province of the jury to find the facts of the case, and no court has the right to substitute its own findings of fact and render judgment thereon in opposition to the findings of fact by a jury. It can only set aside the verdict of the jury and the judgment rendered thereon, the effect of which is to reinstate the case upon the docket in the same situation as it was before there was a trial."

As the Supreme Court of Texas in this case pointed out, the Court of Civil Appeals has the same jurisdic-

tion as the trial court, see for example, *Sanders vs. Harder* (Tex. Sup. Ct.) 227 S.W. 2d 206. Therefore, if the remand to the Court of Civil Appeals be ignored and this be treated as a remand to the trial court for a new trial, either way there is not a final judgment.

In *Metropolitan R. R. Co. vs. Moore*, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334, the Supreme Court of the United States had before it exactly the problem that the Texas Supreme Court has before it in the Deen case. In that case the trial court had overruled a motion for new trial based on the contention that the verdict was against the overwhelming weight and preponderance of the evidence. The intermediate appellate had refused to review the trial court's refusal to grant new trial because of the verdict being against the overwhelming weight and preponderance of the evidence and the Supreme Court of the United States making the exact distinction which the Supreme Court of Texas did between a jury finding based on "no evidence" and a jury finding against the overwhelming weight and preponderance of the evidence. We quote from that opinion:

> "It is urged in argument, however, that the error did not prejudice the plaintiff in error, because the court necessarily passed upon the same matter in considering and sustaining the ruling of the court at special term in refusing to instruct the jury to return a verdict in favor of the defendant upon the evidence offered by the plaintiff; but the question arising on this ruling, and that on the motion for a new trial at the conclusion of the whole evidence, were not identical. It might well be that on the plaintiff's evidence

there was a case sufficiently made out to submit to the jury, while on the whole testimony it might fairly be a question whether the verdict was not against the weight of the evidence, in that sense which would justify the court in granting a new trial. Of course nothing we have said in this opinion is to be construed as indicating any rule of decision in such cases, or is intended in the least to narrow the province of the jury as the proper tribunal for determining questions of fact in trials at common law. The relation of the court to the jury, together constituting the appointed tribunal for the administration of the law in such cases, is regulated by fixed and settled maxims. The legal discretion of the Supreme Court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the supreme court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence.

"For this error, the judgment of the Supreme Court of the District of Columbia at General Term is reversed, and the cause remanded, with directions to take further proceedings therein in conformity with this opinion."

Would anyone contend that the Supreme Court of the United States had entered final judgment in the Moore case? If it wasn't a final judgment in the

Moore case, then it isn't a final judgment in the Deen case.

That the Supreme Court of the United States issued a mandate to the Court of Civil Appeals in this case is unquestioned. That mandate does not make final a judgment which is not final, nor does it amend 28 *U.S.C.A.* 1257. Certiorari lies from a final judgment and not otherwise. If the judgment is not final, the fact that a mandate by this Court preceded it will not make it final.

Deen's further wild statement that if certiorari is not granted he will have no chance to have this Court review the decision of the Texas Supreme Court is, of course, completely untrue. See, for example, *Urie vs. Thompson*, 337 U.S. 163; 93 L.Ed. 1282, 69 S.Ct. 1018; and see *Southern Pacific vs. Gileo* (supra), *Gospel Army vs. Los Angeles* (supra); *Republic Natural Gas vs. Oklahoma* (supra).

Deen's last argument that 28 U.S.C.A., Section 1257, requiring finality in the State court judgments before this court can grant certiorari does not apply in F.E.L.A. cases that is presented on page 18 of the petition for certiorari where Deen's attorney states:

> "*Harsh v. Illinois Terminal R. R. Co.*, supra, is also the answer to The Supreme Court of Texas' statement that the Supreme Court of the United States has not yet taken the step to review a decision of the state court which merely reverses and remands a case for a new trial on the ground that the verdict is against the great weight and preponderance of the evidence and

that the authorities indicate this step will not be taken."

This Court for a hundred years and in something over a hundred cases has uniformly recognized that Congress' enactment of Section 1257 (and its predecessors) restricted this court to the review of only final state court judgments. Deen does not say that Congress has enacted an amendment to Section 1257 which says "except in F.E.L.A. cases." If this Court meant by the Harsh case that such amendment to Section 1257 exists, we are sure that it would have said so. Deen's assumption throughout the petition for certiorari that there is something in F.E.L.A. litigation that entitles a plaintiff therein to favored treatment is certainly not justified by any language in the Act, nor is it consistent with the doctrine of "equal justice under law." If the Harsh case meant that this Court has jurisdiction in an F.E.L.A. case to grant certiorari in a cause remanded to the trial court for a new trial, it would have said so in clear and unmistakable language, and until this Court does so, we think the bench and the bar have the right to believe that 28 U.S.C.A., Section 1257 confines the granting of certiorari to final judgments of state courts.

The conclusion that the judgment is not final and certiorari should, therefore, be dismissed or denied is inescapable.

ON THE MERITS

If the petition for certiorari is not dismissed because the judgment appealed from is not final or because no federal question is presented, it should nevertheless be denied.

In this same cause Deen has filed a petition for mandamus, and most of the arguments presented there are reiterated in the petition for certiorari. The Santa Fe has filed a reply to that petition, and the same points here presented are presented there in more detail and with more authorities. We particularly ask the Court to consider the argument and authorities contained in the Santa Fe's reply to the petition for mandamus under the headings, "Jurisdiction" and "On the Merits" because by doing so we will be able to shorten this.

I. Deen's statement that the setting aside of a jury's verdict because same is against the overwhelming weight and preponderance of the evidence and ordering a new trial is a denial of his right of trial by jury is not correct. To the contrary, every jurisdiction in the United States has expressly held that the granting of a new trial because of the verdict being against the overwhelming weight and preponderance of the evidence by either the trial court or an appellate court is not a denial of a trial by jury. 50 *C.J.S.* Sec. 128, p. 854; 31 *Am. Jur.* Sec. 17, p. 24. A few of the cases by the Supreme Court of the United States and the circuit courts so holding are:

Sinclair vs. Cooper, 108 U.S. 352, 27 L.Ed. 751, 2 S.Ct. 754;

Metropolitan R.R. Co. vs. Moore, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334;
L. & N. R. Co. vs. Woodson, 134 U.S. 614, 33 L.Ed. 1032, 10 S.Ct. 628;
Montgomery Ward & Co. vs. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189;
Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 32 L.Ed. 854, 9 S.Ct. 458;
L. & N. R. Co. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;
Dimick vs. Schiedt, 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296;
Koenigsberger vs. Richmond Silver Mining Co., 158 U.S. 41, 39 L.Ed. 889, 15 S.Ct. 751;
Daffinrud vs. U. S. (7th Cir.) 145 Fed. 2d 724;
Aetna Casualty & Surety Co. vs. Yeatts (4th Cir.) 122 Fed. 2d 350;
Garrison vs. United States (4th Cir.) 62 Fed. 2d 41;
Mt. Adams & E. P. R. Co. vs. Lowrey (6th Cir.) 74 Fed. 463.

In our reply to the petition for mandamus (p. 8) we have li ted a fair sample of the decisions of the State courts containing the same holding.

In ridiculing the Supreme Court of Texas, Deen's attorney (Petition for Certiorari, p. 15) points out that under Texas law no more than two new trials may be granted. Apparently he is not aware of the fact that the Supreme Court of the United States in *L. & N. Co. vs. Woodson*, 134 U.S. 614, 33 L.Ed. 1032 10 S.Ct. 628. had before it a Tennessee statute con-

taining exactly the same language. In the first trial a verdict in favor of the plaintiff for $3,000.00 was set aside as being against the overwhelming weight and preponderance of the evidence. At the second trial a verdict for the plaintiff in the amount of $5,000.00 was set aside on the same ground. At a third trial the verdict was $3,000.00, and again the judge found that the verdict was against the overwhelming weight and preponderance of the evidence, but by reason of the statute he was prohibited from granting a new trial. The Supreme Court of the United States found nothing unconstitutional about the Tennessee procedure, which is exactly like the Texas procedure, nor was there any denial of a jury trial as guaranteed by anybody's constitution. If the granting of a new trial because the verdict was against the overwhelming weight and preponderance of the evidence was a "denial of a trial by jury" this Honorable Court in the Woodson case certainly held to the contrary.

Petitioner cites *Minneapolis St. P. & S.S.M. Ry. Co. vs. Moquin*, 283 U.S. 520, 75 L.Ed. 1243, 51 S.Ct. 501 (petition, p. 23) and makes a quotation therefrom which is out of context. That case is authority for the very proposition here presented, because in that case the trial court required a remittitur on a finding that the jury's verdict was induced by passion and prejudice. The Supreme Court of the United States held that if the verdict was the result of passion and prejudice, the whole had to be set aside, and ordered that an entire new trial be granted.

II. Deen's statement that a finding by an appellate

court that there was enough evidence to require the submission of an issue to the jury is the same thing as a holding by an appellate court that the verdict is not against the overwhelming weight and preponderance of the evidence is without support in either principle or authority. As a matter of fact, the exact opposite is true. We have been unable to find any court opinion which dealt with the matter and which did not make exactly the distinction which the Texas Supreme Court made in this case. Confining ourselves again to cases by the United States Supreme Court and the federal circuit courts, the following are, we think, a representative sample:

Sinclair vs. Cooper, 108 U.S. 352, 27 L.Ed. 751;

Metropolitan R.R. Co. vs. Moore, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334;

Montgomery Ward & Co. vs. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189;

Daffinrud vs. U.S. (7th Cir.) 145 F. ed 724;

Aetna Casualty & Surety Co. vs. Yeatts, (4th Cir.) 122 F. ed 350;

Garrison vs. United States (4th Cir.), 62 F. 2d 41.

The case by the Supreme Court of the United States which contains the most careful and detailed analysis and the most thorough discussion of this very point is *Metropolitan R.R. Co. vs. Moore* (supra), and is, we think, decisive of Deen's contention. The whole opinion is devoted to this single point, and we make

only the following quotation from it, quoting from 30 L.Ed. p. 1025:

> ". . . It is admitted that according to established rules of procedure in such cases, it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact."

It should be further noted that in the *Moore* case the Supreme Court of the United States did exactly what the Supreme Court of Texas did in this case, remand same to the lower court to consider exactly the same point, that is, whether the jury's verdict was against the overwhelming weight and preponderance of the evidence.

III. Deen's statement that the question of overwhelming weight and preponderance of the evidence was involved in the former petition for certiorari which was granted in this Court is not correct. As shown by the decision of the Court of Civil Appeals on the first appeal (275 S.W. 2d 529), only the question of "no evidence" was considered. This is reiterated in the opinion in the Court of Civil Appeals after the mandate (306 S.W. 2d 171) and in the opinion of the Texas Supreme Court (312 S.W. 2d 933). Not only was the point not decided on the prior hearing in the state courts, but it was not presented or argued in the Supreme Court of the United States. We quote from Deen's petition for certiorari on the former appeal, page 15:

> "The Court of Civil Appeals of Texas, in the *Deen* case, found *there was no evidence to support* the above findings of the jury, and set aside such findings and the judgment of the trial court rendered thereon." (Italics ours.)

The same statement was made with reference to holding of the Texas Supreme Court (Petition for Writ of Certiorari, p. 24):

> "Petition for writ of error in the *Deen* case was filed in the Supreme Court of Texas, March 28, 1955. It was finally overruled April 25, 1956. It took the Supreme Court of Texas one year and one month to decide that the record was *completely devoid of any evidence* to support any findings of the jury in favor of Deen." (Italics ours.)

Therefore, we say that the only matter before the Supreme Court of the United States was the question of "no evidence". It held there was "some evidence." It was not presented with the question of the finding being against the overwhelming weight and preponderance of the evidence.

If it had been presented to the Supreme Court of the United States, that Court, like the Supreme Court of Texas, cannot pass upon an assignment of error based on overwhelming weight and preponderance. It passes only on the law question of "some evidence" or "no evidence."

Illustrative of the authorities supporting the foregoing statement is *Aetna Life Ins. Co. vs. Dunken*, 266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342, which reversed a decision (248 S.W. 165) of the Court of Civil

Appeals at Austin and remanded. Other similar cases after the *Dunken* case are:

Great A. & P. Tea Co. vs. Supermarket Equipment Corp., 340 U.S. 147, 95 L.Ed. 162, 71 S.Ct. 127;

Graver Tank & Mfg. Co. vs. Linde Air Products Co., 336 U.S. 271, 93 L.Ed. 672, 69 S.Ct. 535;

Smiley vs. Kansas, 196 U.S. 447, 25 S.Ct. 289, 49 L.Ed. 546.

Since the Supreme Court of the United States has never passed on the question of "weight and preponderance of the evidence" heretofore and has repeatedly and expressly held that it was without power to pass on the "weight and preponderance of the evidence," the Supreme Court of Texas correctly assumed that the Supreme Court of the United States did not do so in the Deen case. The only issue submitted by Deen, and argued by Deen or the Santa Fe on the former trial, was the sufficiency of the evidence to require the submission of the case to a jury, which is another way of saying that there was enough evidence to raise a jury question. That is, and always has been, a question of law, and the Supreme Court of the United States has always held that it was a question of law, and held that when it had determined that there was enough evidence to require the submission of the case to the jury and to prevent the reversal and rendition by an appellate court, its duties were completed, because the question of the verdict being against the

great weight and preponderance of the evidence was for the lower court.

IV. Deen's statement that a trial of a Federal Employers' Liability case in the state court is not governed by state rules of practice is not correct. This Court has never so held and, as a matter of fact, has held that the election by the plaintiff to try the case in the state court means that it will be tried under state rules of practice:

C. R. I. & P. R. Co. vs. Cole, 251 U.S. 57, 64 L.Ed. 133, 40 S.Ct. 62;

Minneapolis & St. L. R. Co. vs. Bombolis, 241 U.S. 211, 60 L.Ed. 961, 36 S.Ct. 595;

Second Employers' Liability Cases, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327;

M.K.T. Ry. Co. vs. West, 232 U.S. 682, 58 L.Ed. 795, 34 S.Ct. 471;

Central Vermont Ry. vs. White, 238 U.S. 507, 59 L.Ed. 1433, 35 S.Ct. 865;

Seaboard Airline R. Co. vs. Padgett, 236 U.S. 668, 59 L.Ed. 777, 35 S.Ct. 481;

K.C.S. R. Co. vs. Leslie, 238 U.S. 599, 59 L.Ed. 1478, 35 S.Ct. 844;

L. & N. R. Co. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;

L. & N. vs. Stewart, 241 U.S. 261, 60 L.Ed. 989, 36 S.Ct. 586;

C. & N.W. R. Co. vs. Gray, 237 U.S. 399, 59 L.Ed. 1018, 35 S.Ct. 620.

In *Dickinson vs. Stiles*, 246 U.S. 631, 62 L.Ed. 908,

Judge Holmes put it with his usual clarity and brevity, quoting from 62 L.Ed. p. 911:

> "It contemplated suits in state courts and accepted state procedure in advance. Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211, 60 L.ed. 961, L.R.A.1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505; Louisville & N. R. Co. v. Stewart, 241 U.S. 261, 60 L.ed. 989, 36 Sup. Ct. Rep. 586. We see no reason why it should be supposed to have excluded ordinary incidents of state procedure."

This Court has never overruled *Dickinson vs. Stiles*, although it has held that some particular rule of practice destroyed the rights of a plaintiff under the Federal Employers' Liability Act, and hence was unenforceable. It is Deen's contention that state rules of practice have no application to Federal Employers' Liability cases. In his petition for mandamus he suggests that such suits must be tried under federal rules applicable to F.E.L.A. cases in state courts. His exact language (petition for mandamus, p. 11) being:

> "While Deen has never conceded that the Texas appellate courts, *under federal procedure applicable to F.E.L.A.*, had authority to etc."

There are no such rules, and the result is that if the state rules of practice do not apply, then there are no rules of practice, and there is no guaranty that anybody will get a fair trial, plaintiff or defendant.

Our discussion of this same point in the reply to Deen's petition for mandamus (p. 39-44) covers this with more detail. However, we particularly want to

refer to the quotation by Deen (Petition for Certiorari, p. 23) from *M. S. P. & S. S. M. Ry. Co. vs. Moquin*, 283 U.S. 520, 51 Sup. Ct. 501, 75 L.Ed. 1243. The quotation is entirely out of context and the case very strongly supports respondent's position not that of Deen. In that case the lower court had found that the jury's verdict was brought about by "passion and prejudice" and to cure it required remittitur. The Supreme Court of the United States held that, if the jury verdict was the result of "passion and prejudice" a remittitur wouldn't cure it and a new trial was mandatory, State rules to the contrary notwithstanding. In other words, this Court held in the Moquin case that the granting of a new trial was essential to preserve the right of trial by jury. Surely Deen will not take the position that an appellate court in Texas denies a jury trial if it sets aside a verdict because same is against the overwhelming weight and preponderance of the evidence, but that the Supreme Court of the United States did not deny a jury trial when it mandatorily required the verdict be set aside in the Moquin case. Certainly, the Moquin case is not authority for Deen's statement (p. 22):

> "Whether a record under State practice would entitle a party to a new trial is immaterial in Federal cases."

V. Deen's statement that the Court of Civil Appeals in Texas has no jurisdiction to require a remittitur in an F.E.L.A. case and that the only court having jurisdiction to grant or require remittitur in an F.E.L.A. case is the United States Supreme Court

(Petition for Certiorari, p. 25, et seq.) is not correct. In fact the exact opposite is true.

Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854;

Southern Ry. vs. Bennett, 233 U.S. 80, 58 L.Ed. 860, 34 S.Ct. 566;

T. & P. Ry. Co. vs. Hill, 237 U.S. 208, 59 L.Ed. 918, 35 S.Ct. 575;

L. & N. R. Co. vs. Holloway, 246 U.S. 525, 529, 62 L.Ed. 867, 870, 38 S.Ct. 379, 381;

S.L. I.M. & S. Ry. Co. vs. J. T. Craft, 237 U.S. 648, 661, 59 L.Ed. 1160, 1165, 35 S.Ct. 704;

N. Y. Central and Hudston River R. Co. vs. Fraloff, 100 U.S. 24, 32, 25 L.Ed. 531, 534;

New York L.E. & W. R. Co. vs. Winter, 143 U.S. 60, 75, 36 L.Ed. 71, 80, 12 S.Ct.Rep. 356;

Herencia vs. Guzman, 219 U.S. 44, 55 L.Ed. 81, 31 S.Ct.Rep. 135.

For example, in *S.L. I.M. & S. Ry. Co. vs. Craft* (supra) there was an F.E.L.A. trial court judgment for the plaintiff in the amount of $11,000.00, the state Supreme Court required a remittitur of $5,000.00, and the Supreme Court of the United States said (59 L.Ed. p. 1165):

> "* * * the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here."

Deen's position apparently is that *Neese vs. Southern*

Ry. Co. 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60, a per curiam opinion overrules all of the prior adjudications, of which the foregoing are merely a sample, and he concludes, therefore, that no State court has the power to require remittitur and that the sole power to do so is vested in the United States Supreme Court. The obvious answer is that this Court in the Neese case neither held so nor said so. During Prohibition there was a malt product marketed under the name "Near Beer" and it was well said that the man who labeled it "*Near* Beer" was a poor judge of distance. May we say that the Neese opinion bears much less proximity to an opinion overruling the cases we have heretofore cited than "Near Beer" was close to real beer.

VI. Deen's statement that certiorari to the present judgment of the Supreme Court of Texas is indispensable to the protection of his rights is not correct. In the first place, as heretofore pointed out, the Court of Civil Appeals may give him the affirmance of the trial court's judgment which he asks the Supreme Court of the United States to order. Secondly, if Deen's worst fears are confirmed, the case will be remanded for another trial before another jury in Brown County, Texas, the forum selected by Deen for the trial of his case. If at that trial he secures a verdict for twice the amount of the present verdict, there will be no Federal question involved, he will have been unharmed and certainly he wouldn't complain of it or appeal from it. If he gets half as much and is of the opinion that the Court of Civil Appeals and the Su-

preme Court of Texas deprived him of a Federal right on the present appeal, he still has the right thereafter to present exactly the same points he now presents to the Supreme Court of the United States and if he is right, it will be remedied on certiorari at that time. See *Urie vs. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018, among the many cases so holding.

If Deen is right, he can win but he cannot lose. That enviable position would seem to negative any reason for the Supreme Court of the United States to overrule fixed principles and create exceptions. The record shows, as pointed out by the Court of Civil Appeals, that Deen was back working ten months after his injury and at the time of the trial had worked regularly for more than four years. Without going outside the record, we cannot tell the Court what has happened since the trial, but we will be glad to do so upon request. In any event, what is involved here is ten months loss of pay (which the record shows was under $2,400.00), and we point this out to prevent the conjuring up of a picture of a disabled plaintiff who sits starving waiting on a final decision. Deen is working for the Santa Fe and getting paid for it, and no delay would work any more irreparable injury to him than to any other party in any other suit.

Deen's attorneys have repeatedly taken the position that justice to Deen has been unreasonably delayed, pointing out that under the record the man was injured on July 12, 1949, and that it is now 1958. Any implication that this delay is chargeable to the Santa Fe is completely unjustified. The judgment in the trial

court is dated May 12, 1954, almost five years after Deen's injury. Without going completely outside the record, we cannot tell the Court why Deen and his attorneys chose to wait five years to bring his case to trial, but we can, within the record, state that the defendant filed no motion for continuance, and it was not responsible for that five years delay in whole or in part. From May 12, 1954, until the Court of Civil Appeals reversed and rendered this cause on February 4, 1955, the defendant was vigorously and diligently seeking to reverse an unjust and excessive judgment. From the date of the Court of Civil Appeals reversal (February 4, 1955) until April 8, 1957, Deen's attorneys, first by application to the Supreme Court of Texas and subsequently by certiorari to the Supreme Court of the United States, were diligently attempting to reverse the decision of the Court of Civil Appeals. Since April 8, 1957, the railroad company has been seeking to have the cause remanded for another trial. Therefore, seven out of the nine years which have elapsed since Deen was injured must be charged to Deen and his attorneys and only two to the Santa Fe. But if the whole were chargeable to the defendant, it would not alter one principle of law nor make just what is unjust. Speedy justice is the objective of all courts, but no court has ever held that speedy is the noun and justice the adjective.

THERE WAS NO VIOLATION OF THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES

The foregoing negatives every basis which Deen's petition for certiorari has asserted, unless the mandate in the former hearing in this same suit precluded any Texas court from deciding anything. Deen construes the mandate of the United States Supreme Court as being the equivalent of an order to the Court of Civil Appeals to affirm the judgment of the trial court. If it is the equivalent of such an order, we humbly submit that the clerk, in transmitting the opinion of this Court and the mandate, made some typographical errors, because that is not what it says, nor even close to what it says. The cause was remanded to the Court of Civil Appeals for further proceedings. On such a remand, the state court has the right to pass on all matters which the Supreme Court of the United States has not passed on.

The first case to which we wish to refer this Court is *Schneider Granite Co. vs. Gast Realty & I. Co.*, 245 U.S. 288, 62 L.Ed. 292, 38 S.Ct. 125. We make the following quotations from 62 L.Ed., p. 294:

> "A judgment of the supreme court, which had affirmed a judgment of the circuit court of the city of St. Louis sustaining the tax (259 Mo. 153, 168 S.W. 687), *was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court* (240 U.S. 55, 60 L.Ed. 523, 36 Sup.Ct.Rep. 254)." (Italics ours.)
>
> * * *
>
> "These contentions must be tested by the true

intent and meaning of the mandate of this court, and, so tested, both must be overruled. *The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the land-owners under the 14th Amendment, as established by our decision.*". (Italics ours.)

The next case is *Georgia Ry. & Electric Co. vs. Decatur*, 297 U.S. 620, 56 S.Ct. 606, 80 L.Ed. 925, and we quote from 80 L.Ed. p. 927:

"April 29, 1935 (295 U.S. 165, 79 L.ed. 1365, 55 S.Ct. 701), we reversed the decree pronounced by the Supreme Court of Georgia in this cause, September 18, 1934 (179 Ga. 471, 176 S.E. 494), and sent it back for further proceedings not inconsistent with the accompanying opinion.

* * *

"After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants of a federal right. We suggested no interpretation of our own and did not affirmatively indicate the further action to be taken. Schneider Granite Co. v. Gast, 245 U.S. 288, 291, 62 L.ed. 292, 295, 38

S.Ct. 125. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly."

The third case is *Sprague vs. Ticonic National Bank*, 307 U.S. 171, 59 S.Ct. 777, 83 L.Ed. 1184.

That the above cases are still the law is evidenced by the following quotation from Judge Frankfurter's opinion in that case (83 L.Ed. p. 1188):

"But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See Re Sanford Fork & Tool Co., 160 U.S. 247, 40 L.ed. 414, 16 S.Ct. 291; Ex parte Century Indem. Co., 305 U.S. 354, ante, 216, 59 S.Ct. 239."

The above rules and propositions are just as applicable to a Federal Employers' Liability case as they are to any other type of litigation, no matter what appellee says to this Court. For example, we will cite four cases by the United States Supreme Court where, on certiorari from a state court, the Supreme Court of the United States reversed the state court and remanded on substantially the same basis as here involved. Following the decision by the Supreme Court of the United States, the state court decided all issues which were proper under the state practice and which,

of course, were not involved and could not have been passed on by the United States Supreme Court. These are the following:

Ellis vs. Union Pac. R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 27 N.W. 2d 921;

Keeton vs. Thompson, 326 U.S. 689, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 191 S.W. 2d 954;

Pauly vs. McCarthy, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261; after remand to the state court, 184 P. 2d 123;

Stone vs. New York C. & St. L. R. Co., 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441; after remand to the state court, 260 S.W. 2d 532.

When the Supreme Court of the United States wants to preclude the state court from considering assignments it did not pass on, it does so in positive and unequivocal language. That can be demonstrated quickly and conclusively by using only one advance sheet. If the Court will look in the Lawyers' Edition advance sheet for March 11, 1957, it will find five railroad cases, or Jones Act cases, reported. Three of these are cited in the opinion of the Supreme Court of the United States in the Deen case. They are:

Rogers vs. Missouri Pacific R. Co., 353 U.S. 500, 1 L.Ed. 2d 493;

Webb vs. Illinois Central R. Co., 352 U.S. 512, 1 L.Ed. 2d 503;

Ferguson vs. Moore-McCormack Lines, Inc., 352 U.S. 521.

Let us take those three cases and see what the Supreme Court of the United States did when it did in fact consider matters included in the state court brief but not passed on there.

We quote from the *Rogers* case (1 L.Ed. 2d, page 502):

> "We have considered the remaining questions not passed upon by the Supreme Court of Missouri, and find them to be unsubstantial. Accordingly, we remand the case for proceedings not inconsistent with this opinion."

We quote from the *Webb* case (1 L.Ed. 2d, page 507):

> "We have considered the remaining questions not passed upon by the Court of Appeals, and find them to be unsubstantial. Accordingly, we remand the case for proceedings in conformity with this opinion."

In the *Ferguson* case, no discussion of other points was contained in the opinion.

However, in another case decided the same day, *Pennsylvania R. Co. vs. Rychlik*, the concluding sentence (1 L.Ed. 2d, page 490) is as follows:

> "The decision below must therefore be reversed and the case remanded to the District Court with instructions to dismiss the complaint."

As demonstrated by the foregoing cases, all of which are out of one advance sheet, when the Supreme Court of the United States passes on points and wants the judgment of the state court (or circuit court) to

be a certain way, it does not hesitate to say so. In the Deen case, the Supreme Court only passed on the "no evidence" issue and therefore obviously left to the Court of Civil Appeals the decision of all of the other points presented.

In *Ex Parte, The State of Texas*, 315 U.S. 8, 86 L.Ed. 579, the United States Supreme Court had the question of a state court's remanding because the Court of Civil Appeals believed that the jury's finding was against the overwhelming weight and preponderance of the evidence squarely presented to it, following a reversal by the Supreme Court of the United States on certiorari. We quote from 86 L.Ed. page 586:

> "In their return, the Chief Justice and Associte Justices of the Supreme Court of Texas state that that Court 'would have rendered the same judgment if it had based the same solely upon its construction of the State statute and not at all upon its construction of the opinion of this Court.' The return further showed that in remanding the cause to the District Court for a new trial the Supreme Court of Texas acted entirely pursuant to state law: '*The Court of Civil Appeals in this State has full power to set aside findings based on conflicting evidence and believed by it to be against the overwhelming weight and preponderance of the evidence and to remand the case for another trial;* but it is without power to set aside findings based on conflicting evidence and then make its own findings and render judgment thereon.' (Italics ours.)
>
> "We read this return as a disclaimer by the judges of the Supreme Court of Texas of the con-

> struction placed upon their opinion by the petitioners in so far as it touches the scope of this Court's ruling in 304 US 224, 82 L ed 1304, 58 S Ct 883, and the effect of that decision upon the future course of this litigation."

The mandate in the Deen case no more foreclosed further action by the state court than the mandate did in *Ex Parte Texas*.

We have heretofore pointed out that the only matter presented to the Supreme Court of the United States by Deen was the question of "no evidence." We have heretofore pointed out that the Supreme Court of the United States has never heretofore passed on "the overwhelming weight and preponderance of the evidence," and has always refused to do so. We have heretofore pointed out that since the Supreme Court of the United States cannot grant certiorari from causes that are remanded, and since the reversal and remanding because a verdict is against the overwhelming weight and preponderance of the evidence would not be a final judgment, the Supreme Court could not have passed on that issue in this case. Deen, in his petition for certiorari, contends that he did present such an issue to the Supreme Court of the United States. If he did so, and the Supreme Court of the United States passed on it, it presumably would have ordered the judgment of the trial court affirmed. However, even if Deen had presented such point, the Supreme Court of the United States certainly by its opinion did not pass thereon, and what it did not pass on, is no portion of its opinion nor does it preclude the state court from passing on it. For example, we quote

from the case of *Hartford Life Insurance Company vs. Blincoe*, 255 U.S. 129, 65 L.Ed. 549, 41 S.Ct. 276, quoting from 65 L.Ed. page 552:

> ". . . The most that can be said of any question that was decided is that it became the law of the case, and, as such, binding on the supreme court of the state, and to what extent binding is explained in Messenger v. Anderson, 225 U.S. 436, 56 L.ed. 1152, 32 Sup. Ct. Rep. 739. *Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to.* (Italics ours.)
>
> • • •
>
> "It was urged, it is true, in the brief of counsel, that the assessment 'was void because it included money for taxes erroneously claimed to be enacted [exacted] under the laws of Missouri.' No notice, however, was taken of the contention and no influence given to it or to the effect it asserted. *If it made any impression at all, it was obviously as a state question, dependent upon the state statutes, upon which we would naturally not anticipate the state courts, the case necessarily going back to them.*" (Italics ours.)

Additional authorities are:

Chas. Wolff Packing Co. vs. Court of Industrial Relations of Kansas, 267 U.S. 552, 69 L.Ed. 785, 45 S.Ct. 441;

Mutual Life Ins. Co. vs. Hill, 193 U.S. 551, 48 L.Ed. 788, 24 S.Ct. 538.

Certainly no Texas court has disregarded or misconstrued the mandate of the Supreme Court of the

United States in this same cause. Deen really concedes this (see petition for certiorari, p. 25) when he says:

> "While the mandate of the Supreme Court of the United States did not leave open for further examination by the state court the sufficiency of the evidence to support the jury's conclusion of employer's negligence, it did leave open certain other questions, all of which have now been decided."

Deen follows that with the Texas courts' decision on insufficiency of the pleadings, the incorrectness of the court's charge, and various other matters, including the requiring of a remittitur. When Deen concedes that the mandate left these questions open, he concedes in effect that what he is doing by the present petition for certiorari is asking for a rehearing on the Supreme Court of the United State's prior decision. In his petition for mandamus, Deen takes the position that after the decision by the Supreme Court of the United States there was nothing left (and that there is nothing left now) for the Supreme Court of Texas and the Court of Civil Appeals to do but enter judgment for Deen. That is certainly inconsistent with his recognition of the fact that the remand to the Court of Civil Appeals by this Court on the former appeal left open matters for the decision by that court without violating the mandate. When you boil it all down, Deen's sole basis for saying that the mandate was violated is his contention that a reversal of a holding of "no evidence" is the exact equivalent of holding that the jury's verdict is not against overwhelming weight and preponderance of the evidence.

In other words, there is no distinction and there is no difference. And if there is anything that we have demonstrated, it is that there is a difference and that one is not the equivalent of the other, and that the Supreme Court of the United States and every other court has held unconditionally to the contrary.

We again ask the Court's indulgence, in the interest of saving some space, by referring to the brief presented by the Santa Fe in reply to the petition for mandamus in this same cause, which of a necessity covers many of the same points and covers some of them more in detail than this brief.

For all of the foregoing reasons, we think it clear that, even if this were a final judgment or if a federal question were presented, the Texas courts have not violated the mandate of the United States Supreme Court, and certiorari should therefore not be granted.

SUMMARY

Jurisdiction

Jurisdiction is denied because there is no final judgment of any state court. 28 *U.S.C.A*: Sec. 1257, expressly provides that judgments must be final before certiorari will lie to a state court. The judgment appealed from was a remand by the Supreme Court to the Court of Civil Appeals to determine in turn whether the judgment of the trial court should be affirmed, subject to the remittitur, or whether the judgment of the trial court should be reversed and the entire cause remanded there for a new trial. That, of course, is not a final judgment.

Secondly, the Santa Fe denies that there is any denial of any federal right or any substantial federal question involved. The worst that could happen to Deen is that a new trial would be had. The granting of a new trial is not the denial of any right of jury trial guaranteed by either the state or federal constitution. If there be any error in the decision appealed from and Deen is in any way injured by the re-trial, his right to apply for certiorari thereafter is well established.

On the Merits

I. The granting of a new trial by either the trial or appellate courts because the verdict is against the overwhelming weight and preponderance of the evidence is not a denial of any right of trial by jury.

II. The decision by this Court that there was enough evidence to support a jury's verdict is not a

decision of the question of whether or not the verdict was against the overwhelming weight and preponderance of the evidence. The two matters are entirely different, as pointed out in the decision of the Supreme Court of Texas and as pointed out by the decision of this Court in *Montgomery Ward & Co. vs. Duncan* (supra) and *Metropolitan R.R. Co. vs. Moore* (supra). This Court did not have before it on the former appeal the question of whether or not the verdict was against the overwhelming weight and preponderance of the evidence. The only issue presented by Deen in his petition for certiorari on the former appeal was the question decided by the Court of Civil Appeals, to-wit, that there was "no evidence" to support the jury's verdict of negligence on failure to furnish proper tools. This Court has held many times that it has no jurisdiction to pass upon the issue of "overwhelming weight and preponderance of the evidence"; consequently, since it has no jurisdiction to pass thereon, it certainly did not pass thereon on the former appeal, particularly when the issue was not presented by Deen.

III. Deen's position that a trial in a state court under the Federal Employers' Liability Act is to be had in accordance with the Federal Rules of Procedure is not correct. An F.E.L.A. plaintiff who elects to file his suit in a state court simultaneously elects to be bound by state practice and procedure, and this Court has so held repeatedly.

IV. The Court of Civil Appeals of the State of Texas is, under the Constitution of the State of Texas, vested with the power to require a remittitur to cure

an excessive verdict. There is nothing in the Federal Employers' Liability Act which denies a state court such power, and, as a matter of fact, the Supreme Court of the United States has many times held that such power is vested in the state court, where the action is brought in a state court, and that the Supreme Court of the United States has no jurisdiction to review the exercise of the discretion so vested in the state court.

The Mandate

Since the Supreme Court of the United States did not pass on the issue of "overwhelming weight and preponderance of the evidence" and certainly did not pass on the excessiveness of the jury's verdict, the mandate to the Court of Civil Appeals, on the former appeal, left these questions open, and there was no disregard of the mandate in this cause.

CONCLUSION

WHEREFORE, premises considered, the respondent, Gulf, Colorado and Santa Fe Railway Company, respectfully prays that certiorari be dismissed or, in the alternative, that it be denied.

Respectfully submitted,

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I certify that a copy of the foregoing respondent's reply to petition for certiorari has been mailed on the 4 day of June, 1958, to the petitioner's attorneys, as follows: to Mr. David M. McCord, 519 Mercantile Bank Building, Dallas 1, Texas; and to Messrs. Johnson, Guthrie & Stanfield, 1608 Mercantile Bank Building, Dallas 1, Texas.

Luther Hudson

LE COPY

Office-Supreme Court, U.S.
FILED
SEP 5 1958
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 187

EARL R. DEEN, *Petitioner,*

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent.*

REPLY OF PETITIONER TO RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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August 28, 1958

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I. INTRODUCTION

There is no escape from the conclusion expressed on page 8 of Deen's Petition for Certiorari that The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States, which directed the Court of Civil Appeals of Texas:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury,"

and to proceed "in conformity with the judgment and decree of this Court above stated * * *." since The Supreme

Court of Texas directed the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury and directed the Court of Civil Appeals to inquire into this question on its own evaluation of the evidence and irrespective of the mandate of the Supreme Court of the United States. Respondent has not and cannot answer this issue although his reply consists of forty-two pages and the citation of some one hundred and two authorities. How does respondent attempt to meet the above issue:

(1) by questioning jurisdiction;

(2) by denying that The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States.

II. JURISDICTION

Respondent attacks jurisdiction on two grounds:

(1) the judgment of The Supreme Court of Texas is not final;

(2) if petitioner is entitled to certiorari his petition should be directed to the Court of Civil Appeals of Texas rather than to The Supreme Court of Texas.

The Finality of the Judgment

Respondent argues at great length and cites many authorities to the effect that a writ of certiorari will only lie

where the highest court of the state has rendered a final judgment. That is not the issue before this Court. The issue is whether a judgment of The Supreme Court of Texas that finally disposes of all matters left open by the mandate of the Supreme Court of the United States is nevertheless not final because The Supreme Court of Texas directs a lower court to inquire further into a question already finally decided by the Supreme Court of the United States. It appears to petitioner that it is the final adjudication by The Supreme Court of Texas of all issues left open by the mandate of the Supreme Court of the United States that constitutes the final judgment irrespective of the form in which The Supreme Court of Texas writes its judgment (See Petition for Certiorari, p. 7 for authorities). After The Supreme Court of Texas finally adjudicated all questions left open by the mandate of the Supreme Court of the United States its judicial discretion terminated. Thereafter, nothing remained for The Supreme Court of Texas but the performance of the ministerial act of rendering judgment for Deen in the principal sum of $15,950.00, with interest and costs, and the execution of the mandate of this Court. Deen does not concede that the Texas appellate courts had a right to take away from him a part of the damages awarded him by the jury, under other decisions of this Court, but says that the mandate in this case did not preclude the Texas Courts from deciding this question in the first instance. Deen had already clearly indicated that if it be finally decided that he was not entitled to judgment

in the principal sum of $21,450.00, as given him by the jury and the trial court, he would accept the $15,950.00 rather than be subjected to further proceedings in the Texas courts.

The Supreme Court of the United States is certainly not powerless to enforce its own mandate and enforce it at the very moment no further proceedings can be had in the state courts, without violating that mandate. Deen hopes that since he cannot present the damages issue in a mandamus proceeding that the Court will grant the Writ of Certiorari as the appropriate remedy or will grant both the writs of mandamus and certiorari.

WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DIRECTED TO THE COURT OF CIVIL APPEALS

This is the second ground advanced by Respondent. It says in effect that Deen should have let the Court of Civil Appeals again inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence and if he did not like that court's decision apply for a writ of certiorari from that court. Deen respectfully asks the Court to consider his Reply to Respondent's Reply to the Petition for Writ of Mandamus on this point. Respondent further suggests that even if the Court of Civil Appeals reversed the case on the evidence point that Deen would not be hurt because, if Deen is right, ultimately the Supreme Court of the United States would enforce its mandate. But

Deen does not want to be like the little boy described by Dickens in Bleak House. The little fellow was promised a hobby horse when the lawsuit was settled. He grew to manhood, went off to war, acquired a real horse and trotted off to another world, and the lawsuit continued.

In our Reply to Respondent's Reply to the Petition for Writ of Mandamus (pages 17-18), petitioner has answered the argument set out on pages 9-10 of Respondent's Reply to Certiorari that petitioner has made wild statements about what a trial court would do in case of another jury's finding in favor of Deen on the same evidence, in view of The Texas Supreme Court and the Court of Civil Appeals holding there is no evidence to support a verdict in favor of Deen and in view of the second decision of The Supreme Court of Texas that "no evidence" includes the lesser finding of "insufficient evidence."

III. ON THE MERITS

Pages 15 to 28 of Respondent's Reply consists of denials of alleged statements of Deen, some of which were not made by petitioner at all, others of which have been distorted. Petitioner will answer these misrepresentations and distortions in the order presented by respondent.

1. The first misrepresentation is:

> "Deen's statement that the setting aside of a jury's verdict because same is against the overwhelming weight and preponderance of the evidence and ordering a new trial is a denial of his right of trial by jury is not correct" (Reply, p. 15).

Deen has made no such statement. Deen does say that The Supreme Court of Texas violated the mandate of the Supreme Court of the United States when The Supreme Court of Texas directed the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence when the Supreme Court of the United States had said:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury."

Petitioner further contends that the Court of Civil Appeals and The Supreme Court of Texas were not justified in taking away a part of the damages awarded him by the jury and the trial court where the undisputed proofs justified with reason the jury's conclusion on this issue.

2. The second misrepresentation by the respondent is:

> "Deen's statement that a finding by an appellate court that there was enough evidence to require the submission of an issue to the jury is the same thing as a holding by an appellate court that the verdict is not against the overwhelming weight and preponderance of the evidence is without support in either principle or authority." (Reply, p. 18.)

Deen made no such statement. Deen does say that when the Supreme Court of the United States held his proofs justified with reason the jury's conclusion that employer negligence played a part in producing his injury, that his evidence met the test for recovery under FELA and no other Court can further inquire into this question or prescribe a different test for recovery, or grant a new trial on this evi-

dence point, or even grant a new trial on newly discovered evidence pertaining to this point finally decided by the Supreme Court of the United States.

3. The third misrepresentation of respondent is:

> "Deen's statement that the question of overwhelming weight and preponderance of the evidence was involved in the former petition for certiorari which was granted in this Court is not correct." (Respondent's Reply, p. 19.)

Deen made no such statement. The Supreme Court of Texas and the respondent have tried so hard to show it was Deen's omission that has prevented them from obeying the mandate of this Honorable Court, petitioner will quote exactly the Question Presented in his Petition for Certiorari:

> "The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues of a jury in favor of the railway and disregarding all issues found by a jury in favor of the injured employee, and by reading into a verdict something that is not there, and in setting aside a judgment of a trial court rendered in favor of the injured employee on the verdict of the jury has deprived the injured employee of the right of trial by jury given him under a Federal statute generally known as the Federal Employers Liability Act." (Original Petition for Certiorari, pp. 9-10.)

This was the question on which the certiorari was granted and this was the question decided when the cause was reversed and the Supreme Court of the United States held the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury. Now if The Supreme Court of Texas and respond-

ent want to split the above question and holding up into "no evidence," "enough evidence," "sufficient evidence," "insufficient evidence," "scintilla of evidence," and "overwhelming weight and preponderance of the evidence" fragments, petitioner canot help it. All petitioner knows is the Supreme Court of the United States has held his proofs have met the test for recovery under FELA.

4. The fourth misrepresentation of the respondent is:

> "Deen's statement that a trial of a Federal Employers' Liability case in the state court is not governed by state rules of practice is not correct." (Reply, p. 22.)

Deen made no such statement. Deen did say:

> "Underlying the whole opinion of the Supreme Court of Texas is the final false assumption that the Federal Employers Liability Act and decisions of this Court are enforceable in Texas state courts only to the extent that Texas practice permits such enforcement."

When petitioner's position in the petition for certiorari is considered as a whole, it is obvious that his contention is that substantive federal rights given federal employers by the Congress under FELA cannot be destroyed by state courts under the guise of local practice. Respondent fully understands the purport of the decisions of the Supreme Court of the United States on this question as evidenced by the following words:

> "This Court has never overruled Dickinson v. Stiles, although it has held that some particular rule of practice destroyed the rights of a plaintiff under the Federal Employers Liability Act, and hence was unenforceable." (Respondent's Reply to Certiorari, p. 23.)

One rule of local practice that the Supreme Court of the United States has been extremely zealous in holding unenforceable, as destroying federal substantive rights, is that which leaves to the state court's decision the amount of evidence necessary to make a jury case under FELA. The Supreme Court of the United States has held the Federal Employers Liability Act is to have uniform application throughout the country unaffected by "local views of common law rules." "This uniformity extends to the type of proof necessary for judgment." *Garrett v. Moore-McCormick (1942), 317 U. S. 239, 63 S. Ct. 246.*

Chicago M. & St. P. Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 S. Ct. 564, 565.

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recover. The kind or amount of evidence required to establish it is not subject to the control of the several states."

See also *Brady v. Southern R. Co. (1943), 320 U. S. 476, 64 S. Ct. 232* and *Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692.*

In

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226,

The Supreme Court of Texas in discussing the *Deen* case stated the above rule in these words:

> "In an action under the Federal Employers Liability Act, the question of what constitutes negligence

> and the sufficiency of the evidence to raise that question for the jury is to be determined by the applicable federal decision."

So is it not true that The Supreme Court of Texas, respondent and petitioner are in complete harmony on this point?

5. The fifth misrepresentation by respondent is:

> "Deen's statement that the Court of Civil Appeals in Texas has no jurisdiction to require remittitur in a FELA case and that the only court having jurisdiction to grant or require remittitur in a FELA case is the United States Supreme Court (Petition for Certiorari, p. 25, et seq.) is not correct." (Respondent's Reply, p. 25.)

Deen made no such statement. Deen's position is fully set out in his petition for certiorari, pages 25-33. Briefly, it is that undisputed evidence justified with reason the jury's conclusion that $39,000.00 will reasonably compensate Deen for his injuries but that his recovery should be reduced $17,550.00, or 45%, because of his own negligence. The trial court accepted the jury verdict and rendered judgment in favor of Deen for the principal sum of $21,450.00, the difference in the two figures above. What the Court of Civil Appeals did is not too clear from the record but it ended up rendering judgment for $12,050.00 more than the jury and the trial court gave Deen in the first place. The Supreme Court of Texas construed the Court of Civil Appeals' action as intending to reduce Deen's recovery in the principal sum of $21,450.00 by $5500.00, allowing him a recovery in the principal sum of $15,950.00.

Deen says this action of the Court of Civil Appeals and The Supreme Court of Texas deprived him of a jury trial on damages contrary to the provisions of FELA. That it is only where the proofs do not support with reason the jury's conclusion on damages that a state court in a FELA case would be justified in setting aside such damages in whole or in part.

6. The sixth misrepresentation of the respondent is:

> "Deen's statement that certiorari to the present judgment of The Supreme Court of Texas is indispensable to the protection of his rights is not correct." (Respondent's Reply, p. 26.)

Deen made no such statement. Deen is willing to make that statement at this time, if it will help respondent present his argument. Briefly, Deen's position is that no further proceedings of any kind can now be had in the Texas courts without violating the mandate of this Court. That the Supreme Court of the United States has the power and the duty at this time to enforce its mandate. If The Supreme Court of Texas can prevent the enforcement of the mandate of this Honorable Court by reversing and remanding the cause for further proceedings in any lower court, trial or appellate, in violation of the mandate, then The Supreme Court of Texas has the power to prevent forever the enforcement of the mandate. Suppose Deen patiently returned to the trial court on respondent's theory that he can win but he cannot lose and after a lapse of another four or five years returns to The Supreme Court of Texas. Suppose

The Supreme Court of Texas again reverses and remands the cause to a lower court. Respondent's argument would still apply. Respondent would have to say Deen must return to the trial court a third time because he can win but cannot lose. Deen's position is the enforcement of the mandate of the Supreme Court of the United States at this time is essential for the protection of his rights. Deen agrees with respondent that delay does not make just what is unjust but delay should not be used to defeat a just claim.

7. The seventh misrepresentation made by the respondent, though this misrepresentation is not made in a numbered paragraph, is:

> "Deen construes the mandate of the United States Supreme Court as being the equivalent of an order to the Court of Civil Appeals to affirm the judgment of the trial court." (Reply, p. 29.)

Deen placed no such construction on the mandate and the respondent knew at the time of making the above statement that Dean did not so construe the mandate. Eight pages later in respondent's same reply it correctly and accurately states Deen's contention in Deen's exact words:

> "While the mandate of the Supreme Court of the United States did not leave open for further examination by the state court the sufficiency of the evidence to support the jury's conclusion of employer's negligence, it did leave open certain other questions, all of which have been decided." (Respondent's Reply, p. 37.)

The climax came on page 37 of Respondent's Reply where respondent belabors petitioner for being inconsistent be-

cause the position on the above point, which respondent charges petitioner with taking, which he did not take, conflicts with the position which petitioner did take.

All the authorities and argument, on pages 29-38 of Respondent's Reply, to the effect that state courts on remand may pass on questions not encompassed in the mandate of the Supreme Court of the United States, all of which petitioner concedes, are not in point on the questions before the Court on the petitions for certiorari and mandamus. What respondent needs are some authorities that hold that after the Supreme Court of the United States has instructed the Court of Civil Appeals in its mandate:

> "We hold the proof justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury,"

that The Supreme Court of Texas may instruct the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury, on its own evaluation of the evidence and wholly apart from the mandate of the Supreme Court of the United States.

Petitioner cannot agree with respondent's statement on page 39 of Respondent's Reply that the writ of certiorari should be denied because no "substantial federal question" is involved. The denial of the right of trial by jury given federal employees by Congress under FELA and the construction of the mandate of the Supreme Court of the United States are indubitably federal questions.

WHEREFORE, petitioner prays as he has heretofore prayed and for general relief.

Respectfully submitted,

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August 28, 1958

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply of Petitioner to Respondent's Reply to Petition for Writ of Certiorari has been mailed on the 29th day of August, 1958, to the Respondent's attorneys as follows: To Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

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